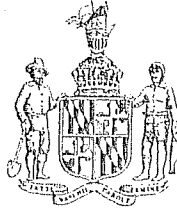


DOUGLAS F. GANSLER  
ATTORNEY GENERAL

KATHERINE WINFREE  
Chief Deputy Attorney General

JOHN B. HOWARD, JR.  
Deputy Attorney General



ROBERT A. ZARNOCH  
Assistant Attorney General  
Counsel to the General Assembly

SANDRA BENSON BRANTLEY  
BONNIE A. KIRKLAND  
KATHRYN M. ROWE  
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND  
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

November 8, 2007

The Honorable Nathaniel J. McFadden  
The Honorable Steven J. DeBoy, Sr.  
Joint Audit Committee  
90 State Circle  
Annapolis, Maryland 21401-1991

Dear Chairmen McFadden and DeBoy:

You have requested advice on the ability of a State employee to gain access to records compiled about the employee while that person is subject to an inquiry or investigation conducted by the State Ethics Commission.

**Background**

The background of your request is set forth in your September 10, 2007 letter:

In the July 24, 2007 audit of the State Treasurer's Office (STO), an issue was raised about a potential conflict of interest that occurred when a business run by a management official's spouse contracted to provide personnel background check services for STO. The finding and the STO response are enclosed with this letter. This issue was brought to the Treasurer's attention in March 2007. At that time, the Treasurer began an investigation of the actions which were alleged to cause the potential conflict of interest.

The Treasurer informed us that in the course of her internal investigation of these allegations, access to the investigatory materials compiled by the State Ethics Commission was deemed necessary. The management official who was the subject of the investigation waived any confidentiality rights she had to enable access to this information. The Treasurer reports, however, that STO

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was not able to access this information and that even the management official who was the subject of the investigation could not access the materials. The State Ethics Commission would only disclose the information to the Legislative Auditor, if the Legislative Auditor made a formal request to access the materials. According to the State Ethics Commission, although the management official who was the subject of the investigation readily offered to waive confidentiality so that the information could be reviewed, that official did not have the right to view the investigatory materials herself, and therefore, could not waive confidentiality.<sup>1</sup>

I contacted the Executive Director of the State Ethics Commission who advised me that the file did not contain a great deal of information and that the employee only sought and was afforded access to information she had provided the Commission (with staff notations redacted). If the employee had requested access to third-party information in the file, I am advised that Commission staff would have provided it. The Commission's records do not reflect a written waiver of confidentiality or even a written request for production of documents. If a written waiver had been sought and obtained, the employee could have given the State Treasurer all the non-privileged information in the file. To the extent that any staff analysis and recommendations to the Commission were contained in the Commission's file, the agency did not provide the information because of confidentiality concerns grounded in regulation and law.

### Questions

In light of this background, you have asked the following questions:

We would like you to clarify the rights of State employees to access

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<sup>1</sup> According to the Legislative Auditor's report, the conflict of interest issue was "reviewed by the State Ethics Commission as a result of an anonymous complaint" and "[i]n February 2003, the Commission completed its review and concluded that, to resolve the matter, the management official only had to amend certain financial disclosure statements to disclose the business relationship with the office." *Audit Report*, Office of the State Treasurer (July 2007) at 29. Believing that "misstatements of fact" had occurred during this review, the Auditor recommended that the Treasurer's Office "refer the matter to the State Ethics Commission for re-evaluation." *Id.* at 30.

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investigatory materials regarding their actions when they are the subject of inquiries or investigations by the State Ethics Commission. Is there a difference in personal access depending on whether the Commission is conducting a preliminary (informal) inquiry or a formal investigation? What authority does the person who is the subject of a State Ethics Commission inquiry or investigation have to authorize other parties to access the information collected by the Commission? If State employees generally do have access, are there any specific provisions which govern how or when an employee may access investigatory materials, and how and when the State Ethics Commission must comply with such a request? If State employees generally do not have access to these materials, what provisions of State law authorize the State Ethics Commission to deny this access to employees who are under investigation?

*Statutory and Regulatory Provisions and Common Law Principles*

State Ethics Commission regulations distinguish between a pre-complaint “preliminary inquiry” and a post-complaint “preliminary investigation”. COMAR 19A.03.02(3) and (4). The former is “the process by which a matter may be presented to the Commission for preliminary review to determine whether the matter should be processed as a complaint ...,” while the latter is “the investigation conducted by the staff counsel or other investigator identified by the Commission, after a complaint has been accepted or issued...”. *Id.*

Under COMAR 19A.03.03A, the Commission may consider as a preliminary inquiry any matter that “arises from any source,” including an anonymous one.<sup>2</sup> On the other hand, a preliminary investigation results from the filing under oath of a signed complaint against a respondent. State Government (SG) Article, §15-401; and COMAR 19A.01.03.04.

Section 15-407 of the SG Article governs the confidentiality of Commission records

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<sup>2</sup> In 1977, Attorney General Burch concluded that the State Board of Ethics, the predecessor to the Commission, had the authority to entertain anonymous complaints. *See 62 Opinions of the Attorney General* 418, 419 (1977)(“[A]nonymous communications concerning the violation of the law can serve the public interest.”)

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“after a complaint is filed.”<sup>3</sup> Commission regulations establish confidentiality rules for both this stage of the investigation and pre-complaint preliminary inquiries. COMAR 19A.01.03.02B. Specifically, relevant portions of these regulations provide that:

- (1) General Rules
  - (a) Except as set forth in §B(2)-(4) of this regulation, during the pendency

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<sup>3</sup> Section 15-407 states that:

- (a) Notwithstanding any other law and except as provided in subsections (b) and (c) of this section, *after a complaint is filed*:
  - (1) the proceedings, meetings, and activities of the Ethics Commission and its employees relating to the complaint are confidential; and
  - (2) information relating to the complaint, including the identity of the complainant and respondent, may not be disclosed by the:
    - (I) Ethics Commission;
    - (ii) staff of the Ethics Commission;
    - (iii) complainant; or
    - (iv) respondent.
- (b) Except as provided in subsection (c) of this section, the restrictions in subsection (a) of this section apply unless:
  - (1) the matter is referred for prosecution; or
  - (2) the Ethics Commission finds a violation of this title.
- (c)
  - (1) *The Ethics Commission may release any information at any time if the respondent agrees in writing to the release.*
  - (2) On request of the respondent, the Ethics Commission at any time shall disclose the identity of the complainant to the respondent.

(emphasis added)

Under COMAR 19A.01.03.09A(1), a respondent also has “the right to inspect and to copy any document that is accessible under the Maryland Public Information Act...”.

of any preliminary inquiry by Commission staff pursuant to Regulation .03 of this chapter or following the filing of a complaint, the proceedings, meetings, and activities of the Commission and its employees in connection with the complaint shall be conducted in a confidential manner.

- (b) Except as set forth in §B(2)-(4) of this regulation, the Commission, its staff, the complainant, and the respondent may not disclose any information relating to the complaint, including the identity of the complainant and the respondent.

(2) Exceptions

- (a) *The Commission may release information at any time if the respondent has agreed in writing to the release.*
- (b) The identity of the complainant shall be disclosed to the respondent at any time in response to a written request from the respondent.
- (c) Information may be disclosed by the Commission or the Commission's staff as necessary to conduct a preliminary inquiry, investigation, or hearing, or to issue subpoenas at the request of the respondent pursuant to State Government Article, §15-404, Annotated Code of Maryland.
- (d) Confidentiality does not apply to referral or release of information to a prosecuting authority pursuant to State Government Article, §15-408, Annotated Code of Maryland.
- (e) Confidentiality may be waived by the *respondent*, and information disclosed accordingly as part of a cure, settlement, or other prehearing resolution of an enforcement proceeding pursuant to Regulation .08 of this chapter. (emphasis added).<sup>4</sup>

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<sup>4</sup> Both in Commission regulations and in the Public Ethics statute, the term "respondent" refers to the person who is the "subject of a complaint". SG Article, §15-102(ii) and COMAR 19A.01.03.05C.

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The Public Ethics Law provisions on Commission inquiries and investigations do not evidence an intent to abrogate common law privileges regarding the confidentiality of records. *Cf. Attorney General v. Gallagher*, 359 Md. 341 (2000) (PIA requirement of disclosure of investigatory file to a person in interest does not prevent assertion of other privileges against non-disclosure). And, at least two common law privileges also restrict access to Commission records. These are the deliberative process privilege and the attorney work product privilege. The deliberative process privilege generally protects “confidential advisory and deliberative communications” to government officials, *Governor v. Washington Post*, 360 Md. 520, 558 (2000).<sup>5</sup> The work product privilege protects the work product of the Commission’s counsel in preparing a case, *Wagonheim v. Maryland State Board of Censors*, 255 Md. 297, 309 (1969); *cf. Md. Rule 2-402(d)* (“[T]he court shall protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney ... concerning the litigation.”) Although these privileges can be asserted by the Commission, they can also be waived, although most State agencies choose not to waive such privileges.

Finally, of some relevance to the issues you have raised is §10-618(f) of the SG Article, which authorizes (but does not require) a public records custodian to deny access to certain investigatory files. The statute applies to records of certain enumerated agencies such as the Attorney General and a State’s Attorney, §10-618(f)(1)(I), but also may protect “an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose”, §10-618(f)(1)(ii) - - language which could encompass the State Ethics Commission’s investigatory functions. *See Fioretti v. Board of Dental Examiners*, 351 Md. 66, 80-82 (1998).

It is important to note that this “investigatory file” exemption from the Public Information Act (PIA) is a conditional one, which in §10-618(f)(2) provides that:

“A custodian *may* deny inspection by a *person in interest* only to the extent that the inspection would:

(I) interfere with a valid and proper law enforcement proceeding;

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<sup>5</sup> This privilege does not protect against disclosure of factual materials unless they are “facts obtained upon promises or understandings of confidentiality, investigative facts underlying and intertwined with opinions and advice, and facts the disclosure of which would impinge on the deliberative process.” 360 Md. at 559.

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- (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.  
(emphasis added).

I have previously advised that a “person in interest” includes the subject of the investigation and could be the agency for which he or she works if “management “ of the agency is the subject of the investigation. *See* Letter of Advice to Brian S. Losover and Timothy N. Timanus, dated August 12, 2003.

### Analysis

Unlike the “personnel records” and “investigatory files” exemptions from the PIA, SG Article, §10-616(I) and §10-618(f), there is no express provision in the Public Ethics Law for access to records of the State Ethics Commission by a “person in interest”.<sup>6</sup> It is true that a “respondent” may agree to release “any information”. However, under the Public Ethics Law and regulations, a respondent is a person against whom a formal complaint has been lodged, not one who is the subject of a pre-complaint “preliminary inquiry” or an anonymous accusation under Commission regulations. In addition, “any information” under these provisions does not necessarily mean “all information.” With some justification, the Commission can argue that this statutory right to release information does not include documents independently protected from disclosure by common law privileges such as the deliberative process or attorney work product privileges.<sup>7</sup>

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<sup>6</sup> It is not unprecedented for a regulatory agency to accord extremely limited access to records to a person who is the subject of an investigation. In *Watkins Motor Lines, Inc. v. EEOC*, 2006 WL 905518 (M.D. Fla.), a federal district court upheld the denial to a company accused of racial discrimination access to all materials in an EEOC investigatory file, except those documents furnished to the agency by the accused business.

<sup>7</sup> In Maryland, there is a rule of construction that statutes in derogation of common law rights and privileges are strictly construed to leave in place the common law

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It might be argued that Commission regulations in and of themselves deny access to all information. *See* pp. 3-4, *supra*. However, the Commission has not taken that position, *see* p. 2, *supra* and, in the PIA context, the Attorney General's Office has said that an agency regulation may not "provide an independent basis for withholding a public record... [because] [a] contrary interpretation would allow such state agencies at their election to undermine the Act." *See Maryland Public Information Act Manual*, (10<sup>th</sup> Ed., January 2007), at 20.

Because an express statutory confidentiality provision exists only for post-complaint inquiries and the confidentiality provision in the pre-complaint context is grounded only in regulation, the issue arises whether statutory authority in the latter situation is governed by the investigatory file provisions of the PIA. *See* p. 6, *supra*. As I indicated earlier, I do believe this exemption could apply to the Commission's functions, including a preliminary inquiry. And if this exemption were applied to third party information, a "person in interest," *viz.* the subject of the inquiry, could be denied access only if one or more of the seven enumerated conditions existed.<sup>8</sup> However, because the Commission has been asked by the Auditor to take up the matter again, the Commission could persuasively argue that access would "interfere with a valid and proper law enforcement proceeding". SG Art., §10-618(f)(2)(I).

Although the Commission can assert this PIA exemption as a reason for denying access to the record in question, it is important to note that the investigatory file exemption is a discretionary one that does not have to be invoked by the agency.

### Summary

To summarize my conclusions with respect to the interaction of this rather tangled

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unless expressly abrogated. *Bruce v. Dyer*, 309 Md. 421 (1987). The Public Ethics Law contains no such express abrogation. In addition, in an analogous setting - - the PIA - - the fact that a person may have conditional access to information under one exemption, *e.g.* investigatory files, does not mean that information independently privileged in the file must be disclosed. *See Attorney General v. Gallagher, supra*.

<sup>8</sup> If the subject obtains access pursuant to this provision, that data could be shared with his or her employer. And, if "management" of the agency is really the subject of the inquiry, the agency could obtain such information directly.



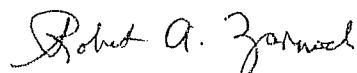
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web of statutory, regulatory and common law provisions:

- 1) The subject of a Commission preliminary inquiry or investigation is entitled to obtain access to information he or she furnished to the agency as well as information obtained from a third party.
- 2) The Commission may deny access to information in its files with respect to an accused employee if such information is protected by common law privileges, such as the deliberative process or attorney work product privilege. However, the Commission could choose to waive such privileges and permit access, although most State agencies would not make such a waiver.
- 3) Factual information obtained from third parties may also be protected from disclosure if release of the data would interfere with the deliberative process.
- 4) A more secure statutory basis that would address the disclosure of third party information obtained during a preliminary inquiry is the investigatory file PIA exemption found in SG Art., §10-618(f)(2). This provision would allow access to information by the subject (and in some cases his or her employer), unless one or more enumerated conditions exist. Because this is a discretionary PIA exemption, the Commission is not required to invoke it and may permit access.

If changes are deemed necessary to assure greater access by employees to Commission files, it is possible that some steps can be taken administratively, *viz.* revision of Commission regulations, or the Public Ethics Law could be amended. I hope this is responsive to your inquiry.

Sincerely,



Robert A. Zarnoch  
Assistant Attorney General  
Counsel to the General Assembly

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cc: The Honorable Nancy Kopp  
Bruce Myers  
Robert A. Hahn  
Jennifer K. Allgair  
Karen Morgan