
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
FEBRUARY 7, 2003
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on February 7, 2003.

Commission:

Present: David Huebner, Chairperson
Diane F. Boyer-Vine, Legislative Counsel
Joyce G. Cook
Desiree Icaza Kellogg
Edmund L. Regalia
William E. Weinberger

Absent: Frank Kaplan, Vice Chairperson
Bill Morrow, Senate Member

Staff: Nathaniel Sterling, Executive Secretary
Brian P. Hebert, Staff Counsel

Consultants: None

Other Persons:

Genevieve Diane Colborn, Personal Insurance Federation of California, Sacramento
Diana Dorame, State Bar Family Law Section, Executive Committee, Napa
Donna Ferebee, Victim Compensation and Government Claims Board, Sacramento
John Hancock, State Bar Business Law Section, Financial Institutions Committee,
Oakland
Robert Herrell, Office of Senator Jackie Speier, Sacramento
Elizabeth A. Huber, State Bar Business Law Section, Consumer Financial Services
Committee, El Segundo
Kia Jorgensen, Wallace, Puccio & Garrett, Sacramento
Gene Mansfield, Advocate, Sacramento
S. Guy Puccio, Executive Council of Homeowners, Wallace, Puccio & Garrett,
Sacramento
Stan Wieg, California Association of Realtors, Sacramento
Garrett Williams, State Farm Insurance Company, Sacramento
Dana Winterowd, Department of Consumer Affairs, Office of Privacy Protection,
Sacramento

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MINUTES OF DECEMBER 13, 2003, COMMISSION MEETING

1 The Commission approved the Minutes of the December 13, 2002,
2 Commission meeting as submitted by the staff, subject to the following
3 correction:

4 On page 4, line 14, “1378(b)” should be “1378.070(b)”.

ADMINISTRATIVE MATTERS

5 **Commission Membership**

6 The Executive Secretary reported that Julia Sylva resigned her appointment to
7 the Commission immediately prior to the December 13, 2002, meeting. The
8 Governor has not yet named a replacement.

9 The Executive Secretary reported that the Governor’s appointments of Frank
10 Kaplan, Desiree Icaza Kellogg, Edmund L. Regalia, and William E. Weinberger to
11 the Commission were this day confirmed by the Senate.

12 **Commission Budget**

13 The Commission discussed the Governor’s budget proposal that would
14 eliminate the general fund allocation for the Commission. The Commission
15 agreed it would seek the necessary budget allocation through the regular
16 legislative budget process. The Commission also directed the staff to consider the
17 possibility of a public-private collaboration; this would have to be done in such a
18 way that it would not affect the Commission’s neutrality. The public-private
19 alternative should be a low priority; the focus should remain on the regular
20 legislative budget process.

1 **Commission Member Per Diem Allowances**

2 Commission members present at the meeting expressed an interest in
3 waiving their per diem allowances (\$100 for each day's attendance at a
4 Commission meeting) for the remainder of the fiscal year, in consideration of the
5 state's fiscal situation and in the interest of reducing meeting expenses (see
6 discussion immediately below). The Commission directed the staff to prepare
7 and send to Commission members the necessary paperwork to enable them to
8 waive their per diem allowances.

9 **Meeting Schedule**

10 The Commission considered its meeting schedule for 2003 in light of
11 demands on staff time, in the interest of minimizing expenses, and in light of
12 Budget Letter 03-02 (relating to annual meetings for state advisory boards and
13 commissions). Of the meetings previously scheduled for 2003, the Commission
14 decided to reduce the March meeting to one day, eliminate the April meeting,
15 and make the June meeting a two-day meeting in Los Angeles. The Commission
16 will consider the remainder of the 2003 meeting schedule at a later time, when
17 the situation for the next fiscal year becomes more clear.

18 With these revisions, the meeting schedule for the remainder of the current
19 fiscal year is:

20	March 2003	Sacramento
21	March 7 (Fri.)	10:00 am – 5:00 pm
22	April 2003	No Meeting
23	May 2003	No Meeting
24	June 2003	Los Angeles
25	June 5 (Thur.)	10:00 am – 5:00 pm
26	June 6 (Fri.)	9:00 am – 4:00 pm

27 **Employee Matters**

28 The Commission held a closed session with the Executive Secretary to
29 consider employee matters. The Executive Secretary reported that he does not
30 plan to initiate layoff proceedings as a result of the Governor's budget proposal,
31 since he anticipates that the Commission will receive a sufficient budget
32 allocation in the legislative budget process. The Commission approved the
33 Executive Secretary's plan to fill the vacant Assistant Executive Secretary

1 position at the full time level without change of classification, by promotion from
2 within the agency.

STUDY B-400 – FINANCIAL PRIVACY

3 The Commission considered Memorandum 2003-1, relating to financial
4 privacy. The Commission also heard general comments of the Personal Insurance
5 Federation of California, a written copy of which is attached to the First
6 Supplement to Memorandum 2003-1.

7 The Commission made the following decisions with respect to the issues
8 raised in the memorandum.

9 **Scope of Project**

10 *General*

11 The Commission decided that, at least initially, it would limit the scope of this
12 study to transactions that would be subject to the Gramm-Leach-Bliley Act and
13 the Fair Credit Reporting Act. The staff will prepare material for the next meeting
14 that elaborates the scope of coverage of those statutes. The staff should also
15 suggest whether there is a general standard that might be used to distinguish
16 “financial” from other commercial transactions.

17 *Attorneys and Others in a Confidential Relationship*

18 With respect to possible exemption from general privacy provisions of
19 attorneys and others in a confidential relationship, the Commission requested
20 further staff research on which specific confidential relationships could be
21 affected.

22 **Preemption**

23 The staff suggested that any statute drawn by the Commission should include
24 a deferred operative date and a mechanism whereby the state may apply for a
25 preemption determination by the Federal Trade Commission, at least with
26 respect to the Gramm-Leach-Bliley Act. The staff will research how much time,
27 realistically, should be allowed for the preemption determination.

28 The Commission observed that various federal regulatory schemes have
29 different preemption approaches. The Commission will investigate the
30 possibility that Gramm-Leach-Bliley would be construed to override the various
31 specialty regulatory statutes insofar as privacy issues are concerned.

1 The Commission agreed with the staff recommendation that, at least for
2 purposes of any tentative regulation circulated for comment, state legislation
3 should preempt local regulation in the field. In order to ensure that this approach
4 is upheld in the courts, it may be useful to include in the state legislation a
5 finding that this is a matter of statewide importance, rather than a municipal
6 affair, and that local preemption is therefore necessary.

7 **Interstate Commerce**

8 The Commission discussed potential problems for financial institutions in
9 complying with differing privacy regulations among the various states. The
10 Commission noted that this sort of problem is not new. For example, pursuant to
11 the federal Truth in Lending Act (Regulations Z and M) states have adopted
12 disclosure requirements, which, though complex, have not precluded businesses
13 from operating satisfactorily. There may be some experience in that area we can
14 look to for guidance.

15 The Commission felt that as a matter of general policy, state law should seek
16 to track federal definitions, categories, and concepts, so as to facilitate compliance
17 by financial institutions.

18 **Types of Information Controlled**

19 The Commission discussed the distinction between publicly available
20 information and nonpublic information that may be personally identifiable,
21 within the meaning of federal law. One approach is to distinguish between
22 sources of the information — if provided to a financial institution by the
23 consumer it would be protected, and if obtained by the financial institution from
24 public sources it would not be. The Commission will further research this matter,
25 in particular with respect to the intent of the Gramm-Leach-Bliley Act and
26 implementing regulations.

27 The Commission also discussed interaction of general financial privacy
28 statutes with specific privacy statutes applicable in various contexts, such as
29 medical information privacy regulations. The staff will attempt to catalog the
30 various provisions. The basic presumption should be that the general statutes do
31 not override the special statutes, although the Commission may want to revisit
32 that concept when we have a complete list. In particular, if the general financial
33 privacy statute is more protective of consumer rights than the special statute, that
34 will require careful attention.

1 **Opt In v. Opt Out**

2 *Affiliates*

3 The Commission agreed with the staff recommendation that the Commission
4 should hold off making policy decisions on issues relating to information sharing
5 between affiliates until it has collected more information on the matter.

6 The Commission requested further information concerning how the
7 Connecticut and North Dakota financial privacy statutes treat consumer control
8 of affiliate sharing.

9 The Personal Insurance Federation of California pointed out that, at least with
10 respect to the insurance industry, an affiliate structure is standard for legal and
11 other reasons, and suggested that any treatment of information sharing by
12 affiliates must recognize that fact. The Commission requested further
13 information relating to the nature of affiliate relationships in the insurance
14 industry and the legal requirements that lead to such an affiliate structure.

15 It was also suggested that the federal position on affiliate sharing may be
16 inconsistent with the basic approach of the state to licensure and regulation of
17 affiliates. Whereas the federal regulatory approach is to control the parent or
18 holding company, the state regulatory approach is to control the affiliate. See,
19 e.g., Ops. Atty. Gen. 84-903 (1985).

20 *Joint Marketing Agreements*

21 The Commission raised the issue whether under the Gramm-Leach-Bliley Act
22 there is any restriction on the size of an entity that may enter into a joint
23 marketing agreement and thereby qualify to share information without an
24 opportunity for consumer control. The Commission requested further
25 information about the law and practice in the area, and treatment of this issue in
26 other jurisdictions.

27 *Unaffiliated Third Parties*

28 The Commission inquired about the extent to which financial institutions
29 may transfer customer financial information to unaffiliated third parties, and
30 how significant a source of revenue this is. Persons in attendance at the meeting
31 did not have this information available. It was suggested, however, that the
32 dispersion of nonpublic personal information to third parties is not necessarily
33 directly related to identity theft — it is the type of information transferred that is
34 critical. For example, a person's account balance may not be helpful to an identity

1 thief, whereas the person's social security number and account number would
2 be.

3 The staff will conduct further research on these issues.

4 *Facilitate Transactions*

5 The Commission agreed with the principle that the law should allow sharing
6 of personal information for the purpose of facilitating the specific transaction
7 requested by the consumer.

8 **Privacy Notices**

9 The Commission discussed issues related to the understandability of the
10 privacy notice and adequacy of communication to consumers of their
11 opportunity to control sharing of their personal information. Among the
12 suggestions made were that the law allow privacy notices to be consolidated,
13 that the law prescribe general standards of readability rather than specific forms
14 (subject to review of a regulatory authority), and that the law not regulate opt in
15 notices, only opt out notices. The Commission deferred decision on these
16 matters.

17 **International Competition**

18 The Commission agreed that as a general policy, it would seek to propose
19 statutory regulation that would be not inconsistent with foreign regulation (see,
20 e.g., the EU Safe Harbor), so as to facilitate the ability of entities doing business in
21 California to be competitive in international commerce.

22 **State Regulators**

23 The Commission discussed, but did not decide, issues relating to rulemaking
24 by state regulators. Among the questions the Commission will consider during
25 the course of the project are what issues, if any, should be referred to state
26 regulators, what standards are appropriate to govern state regulations, and
27 whether a single regulator should be designated for all privacy-related issues.

28 **Remedies**

29 The Commission discussed the adequacy and inadequacy of various civil and
30 administrative remedies for privacy violations. The Commission was not inclined
31 to limit the scope of its investigation, at least at this point in the study.

1 **Jurisdictional Issues**

2 The Commission noted possible long arm jurisdictional problems in enforcing
3 state privacy rights, particularly where electronic transactions are involved. The
4 Commission will not seek to address these problems as part of this study because
5 they are broader than privacy issues. However, the Commission will bear them
6 in mind as it proceeds through the study.

7 **Retroactivity**

8 The Commission noted the need for further research on the extent to which
9 state privacy regulations can limit information sharing pursuant to contracts in
10 effect at the time state law is enacted. The Commission will also further research
11 the possible need to provide a deferred operative date or another mechanism to
12 allow time for a Federal Trade Commission preemption determination, and for
13 any forms that require revision or implementing regulations that must be
14 adopted.

APPROVED AS SUBMITTED

Date

APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

Chairperson

Executive Secretary