

Department of Legislative Services
Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE

House Bill 62 (Delegates Rosenberg and Reznik)
Health and Government Operations

State Government - Public Information Act - Public Institutions of Higher
Education - Permissible Denials

This bill authorizes a custodian of a public record to deny inspection under the Maryland Public Information Act (MPIA) of a part of a public record that contains (1) data produced or collected by or for faculty or staff of a public institution of higher education under certain circumstances; or (2) correspondence or research produced by faculty on public policy issues.

Fiscal Summary

State Effect: None. Changing the conditions under which a custodian may deny inspection of a public record under MPIA does not materially affect State operations or finances.

Local Effect: None. Changing the conditions under which a custodian may deny inspection of a public record under MPIA does not materially affect community college operations or finances.

Small Business Effect: None.

Analysis

Bill Summary: Specifically, a custodian may deny inspection of that part of a public record that contains data or other information of a proprietary nature that:

- was produced or collected by or for faculty or staff of a public institution of higher education;

- was produced or collected in the conduct of or as a result of study or research on medical, scientific, technical, or scholarly issues; and
- has not been publicly released, published, or copyrighted.

A custodian may deny inspection of a part of a public record covered by this provision regardless of whether the study or research was sponsored by the public institution of higher education alone or in conjunction with a unit of State or local government or a private entity.

This provision does not apply to financial or administrative records of a public institution of higher education.

Current Law: MPIA grants the public a broad right of access to records that are in the possession of State and local government agencies. The Act's basic mandate is to enable people to have access to government records without unnecessary cost or delay.

Custodians have a responsibility to provide such access unless the requested records fall within one of the exceptions in the statute. A custodian must deny any inspection of certain public records, including, for example, adoption records, welfare records, and certain hospital records. A custodian must deny inspection of certain other public records only in part. For example, a custodian must deny inspection of the part of a public record that contains information about the security of an information system.

A "custodian" is defined under MPIA as the official custodian or other authorized individual with physical custody and control of a public record.

Background: Recently, several organizations have made state Freedom of Information Act (FOIA) requests demanding materials and data developed by faculty members at public institutions of higher education as well as emails exchanged among scholars. The requests appeared to be an attempt to either intimidate or embarrass the professors for political beliefs related to their academic studies or to attack their research. Professors and academic scholars, including Greg Scholtz, the director of academic freedom for the American Association of University Professors, have expressed their belief that these types of requests will have a "chilling effect on academic freedom" and may deter professors from doing research on controversial topics.

Several states have adopted legislation that provides academic, freedom-based exemptions from the states' FOIA requests. Utah's legislation seems to be the most protective of its faculty members' freedom from requests for information, including unpublished research-related information and "scholarly correspondence." Ohio exempts "intellectual property records" produced or collected by faculty and other employees of

state universities that have not been publicly released, published, or patented; while New Jersey exempts “scholarly records.” Delaware, Maine, and Virginia have also adopted legislation protective of academic freedom in regards to freedom of information requests. Other states, such as Michigan, have explicitly written into their FOIA statutes a balancing test so that the custodian may withhold information if “frank communications” clearly outweigh the public’s right to know.

The U.S. Supreme Court has not directly addressed academic freedom in relationship to FOIA requests, but it has traditionally accorded special attention to academic freedom, including it within the free speech protections of the First Amendment. During the McCarthy era, after a professor, Paul Sweezy, refused to answer a number of questions before a judge, he was found in contempt of court and thrown in jail. The Supreme Court held that there had been an “invasion of [Sweezy’s] liberties in the areas of academic freedom and political expression – areas in which government should be extremely reticent to tread.”

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Morgan State University, University System of Maryland, American Constitution Society for Law and Policy, *The New York Times*, Department of Legislative Services

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