Department of Legislative Services

Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 671 (The Speaker)
Judiciary

Public Information Act – Personnel and Investigatory Records – Complaints Against Police Officers

This bill establishes that a record relating to a formal complaint of job-related misconduct made against a police officer is not a personnel record for purposes of Maryland's Public Information Act (PIA) under specified circumstances. Thus, such records are not subject to mandatory denial of inspection under PIA, but instead are subject to discretionary denial. However, a custodian may deny inspection only under specified conditions. A custodian of a public record *must* allow inspection of personnel records and specified records relating to misconduct complaints by the U.S. Attorney, the Attorney General, the State Prosecutor, or a State's Attorney. In addition, the bill requires law enforcement agencies to annually submit specified information relating to use of force complaints to the Maryland Police Training and Standards Commission (MPTSC). The Governor's Office of Crime Prevention, Youth, and Victim Services (GOCPYVS) may not make grant funds available to law enforcement agencies that do not comply with the bill's reporting requirement, as specified. **The bill takes effect July 1, 2021.**

Fiscal Summary

State Effect: The bill's requirements can likely be handled with existing budgeted resources, as discussed below. Revenues are not anticipated to be materially affected.

Local Effect: The bill's requirements can likely be handled with existing local government resources, as discussed below. Revenues are not anticipated to be materially affected.

Small Business Effect: None.

Analysis

Bill Summary: A record relating to a formal complaint of job-related misconduct made against a police officer, including an investigation record, a hearing record, or a disciplinary decision, is not a personnel record for purposes of PIA if (1) the alleged misconduct involves the discharge of a firearm; (2) the alleged misconduct involves the use of force resulting in death or serious bodily injury; or (3) the police officer was "administratively charged" with:

- committing a sexual assault;
- engaging in dishonesty, committing perjury, making false statements, filing false reports, or destroying, falsifying, or concealing evidence directly relating to the reporting, investigation, or prosecution of a crime;
- engaging in prohibited discrimination directly relating to the reporting, investigation, or prosecution of a crime; or
- improperly using force against a member of the public.

A custodian may deny inspection of a record described above only to the extent that the inspection would:

- interfere with a valid and proper law enforcement proceeding;
- deprive another person of a right to a fair trial or an impartial adjudication;
- constitute an unwarranted invasion of personal privacy;
- disclose the identity of a confidential source;
- disclose an investigative technique or procedure;
- prejudice an investigation; or
- endanger the life or physical safety of an individual.

However, a custodian *must* allow inspection by the U.S. Attorney, the Attorney General, the State Prosecutor; or a State's Attorney.

If a person requests inspection of records relating to a formal complaint of job-related misconduct made against a police officer and the request is denied, the custodian must provide the person with a statement of the outcome of the investigation of the complaint.

"Administratively charged," as it applies to the bill, means that a police officer has been formally accused of misconduct in an administrative proceeding.

Required Reporting

By March 1 annually, each law enforcement agency must submit to MPTSC the number of use of force complaints made against its police officers during the previous calendar year, aggregated by the number of complaints administratively charged, not charged, unfounded, and exonerated, as defined under the bill. By July 15 annually, MPTSC must post on its website and submit to the General Assembly a compendium of the information submitted by law enforcement agencies. If a law enforcement agency has not submitted the required report by July 1 for the previous calendar year, GOCPYVS may not make any grant funds available to the law enforcement agency.

Current Law/Background:

Public Information Act

PIA establishes that all persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees. Each governmental unit that maintains public records must identify a representative whom a member of the public may contact to request a public record. The Office of the Attorney General (OAG) must post all such contact information on its website and in any *Public Information Act Manual* published by OAG.

Mandatory Denials: In general, a custodian must deny inspection of a public record or any part of a public record if (1) the public record is privileged or confidential by law or (2) the inspection would be contrary to a State statute, a federal statute or regulation, the Maryland Rules, or an order of a court of record. PIA also specifies various types of personal and confidential records of which a custodian *must* deny inspection unless otherwise provided by law, such as personnel records.

A custodian must deny inspection of a personnel record, including an application, a performance rating, or scholastic achievement information. However, a custodian must allow inspection by the person in interest, an elected or appointed official who supervises the work of the individual, or a specified employee organization, subject to limitations.

Discretionary Denials: Unless otherwise provided by law, if a custodian believes that inspection of a part of a public record would be contrary to the public interest, the custodian *may* deny inspection of that part of the record as provided under PIA. PIA specifies the types of records that are eligible for discretionary denial.

Records Pertaining to Investigations, Intelligence Information, or Security Procedures: A custodian may, subject to specified conditions, deny inspection of:

- records of investigations conducted by the Attorney General, a State's Attorney, a municipal or county attorney, a police department, or a sheriff;
- an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose; or
- records that contain intelligence information or security procedures of the Attorney General, a State's Attorney, a municipal or county attorney, a police department, a State or local correctional facility, or a sheriff.

However, a custodian may deny inspection of such records by a person in interest only to the extent that the inspection would (1) interfere with a valid and proper law enforcement proceeding; (2) deprive another person of a right to a fair trial or an impartial adjudication; (3) constitute an unwarranted invasion of personal privacy; (4) disclose the identity of a confidential source; (5) disclose an investigative technique or procedure; (6) prejudice an investigation; or (7) endanger the life or physical safety of an individual.

"Person in interest," as it applies to PIA, means (1) a person or governmental unit that is the subject of a public record or a designee of the person or governmental unit; (2) if the person has a legal disability, the parent or legal representative of the person; or (3) as to requests for correction of certificates of death under State law, the spouse, adult child, parent, adult sibling, grandparent, or guardian of the person of the deceased, as specified.

Procedure for Denial: A custodian who denies inspection of a public record must, within 10 working days, provide a written statement to the applicant that gives (1) the reason for denial; (2) if denying a part of a record on a discretionary basis, a brief explanation of why the denial is necessary and why redacting information would not address the reasons for the denial; (3) the legal authority for the denial; (4) a brief description of the undisclosed record (without disclosing the protected information); and (5) notice of the available statutory remedies.

Denial of Personnel Records Relating to Police Disciplinary Actions: In *Maryland Department of State Police v. Teleta S. Dashiell*, 443 Md. 435, 117 A.3d 1 (2015), the Court of Appeals held that the internal affairs records of an investigation into the conduct of a State police officer were "personnel records" exempt from mandatory disclosure under PIA, despite the fact that the respondent – who had filed a complaint against the officer – had identified the officer in a public forum and that her complaint against him was sustained. In addition, the court held that the respondent, as the complainant, was not a person in interest with respect to the requested records.

Law Enforcement Officers' Bill of Rights – Expungement of a Record of a Formal Complaint

Under the Law Enforcement Officers' Bill of Rights (LEOBR), a law enforcement officer, on written request, may have expunged from any file the record of a formal complaint made against the law enforcement officer if at least three years have passed since the final disposition by the law enforcement agency or hearing board and (1) the law enforcement agency that investigated the complaint exonerated the law enforcement officer of all charges in the complaint or determined that the charges were unsustained or unfounded or (2) hearing board acquitted the law enforcement officer, dismissed the action, or made a finding of not guilty. Evidence of a formal complaint against a law enforcement officer is not admissible in an administrative or judicial proceeding if the officer is eligible for expungement of the formal complaint.

For additional information on LEOBR, see the **Appendix – Law Enforcement Officers' Bill of Rights – Current Law/Background.**

Use of Force Incident Reports

Under § 3-514 of the Public Safety Article, each law enforcement agency must require a law enforcement officer who was involved in a use of force incident in the line of duty to file an incident report regarding the use of force by the end of the officer's shift, unless the officer is disabled.

Maryland Police Training and Standards Commission

MPTSC, an independent commission within the Department of Public Safety and Correctional Services, operates approved police training schools and prescribes standards for and certifies schools that offer police and security training. In consultation and cooperation with various entities, it also sets minimum qualifications for instructors and certifies qualified instructors for approved training schools.

MPTSC is charged with developing a system by which law enforcement agencies report to MPTSC on the number of serious officer-involved incidents each year, the number of officers disciplined each year, and the type of discipline administered to those officers. MPTSC must annually summarize the information submitted by law enforcement agencies, post the summary on the commission's website, and submit the summary to the General Assembly, as specified. The most recent report can be found here.

Governor's Office of Crime Prevention, Youth, and Victim Services

GOCPYVS is a coordinating office that allocates resources and develops public policy related to criminal justice, crime reduction, juvenile delinquency, and victim services. GOCPYVS is responsible for administering various law enforcement grants. The Governor's proposed fiscal 2022 budget includes $43.7 million in general funds for local law enforcement grants and $74.6 million in general funds for State Aid for Police Protection grants.

State/Local Fiscal Effect: It is assumed that the bill's PIA provisions for inspection of records relating to formal misconduct complaints apply in a limited number of cases. The Department of State Police (DSP), for example, advises that, in 2020, five complaints were filed with DSP for alleged misconduct relating to the discharge of a firearm, four complaints were filed for alleged misconduct relating to use of force resulting in death or serious bodily injury, and one State trooper was administratively charged for conduct specified under the bill. For further context, according to MPTSC, in 2019, statewide, there were four complaints of excessive force that were investigated and sustained against an officer where the force resulted in serious injury or death and 31 complaints of criminal misconduct that were investigated and sustained against an officer.

Thus, it is assumed that DSP and other law enforcement agencies can comply with the bill's PIA requirements using existing budgeted resources. However, DSP has previously advised the Department of Legislative Services that it is unable to absorb any increase in its PIA workload without additional personnel. Thus, to the extent that DSP experiences more than a minimal increase in PIA requests as a result of the bill, general fund expenditures for DSP increase by approximately $70,000 annually for personnel-related costs. Likewise, in the event that the bill results in a significant increase in the PIA workload of local law enforcement agencies, local expenditures may increase for some jurisdictions to hire staff to process the requests.

It is assumed that State and local law enforcement agencies can meet the bill's reporting requirements with existing resources. As noted above, law enforcement agencies already submit data to MPTSC on serious officer-involved incidents each year. MPTSC advises that it can collect and compile the reports submitted by law enforcement agencies with existing resources.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); State Prosecutor's Office; Governor's Office of Crime Prevention, Youth, and Victim Services; Department of Natural Resources; Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Transportation; Charles, Frederick, and Montgomery counties; City of Havre de Grace; Department of Legislative Services

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Appendix
Law Enforcement Officers' Bill of Rights – Current Law/Background

The Law Enforcement Officers' Bill of Rights (LEOBR), Title 3, Subtitle 1 of the Public Safety Article, was enacted in 1974 to guarantee police officers specified procedural safeguards in any investigation that could lead to disciplinary action. It extends to police officers of specified State and local agencies.

Investigation of a Complaint

Statute of Limitations: Except for charges that relate to criminal activity or excessive force, the statute of limitations for a law enforcement agency to bring administrative charges against a law enforcement officer is one year after the act that gives rise to the charges comes to the attention of the appropriate law enforcement agency official.

Procedures: A complaint against a law enforcement officer alleging brutality in the execution of the officer's duties may not be investigated unless the complaint is signed and sworn to, under penalty of perjury.

If an individual files a complaint alleging brutality within 366 days after the alleged brutality occurred, a law enforcement agency must investigate the matter. There is no time limitation on a law enforcement agency to launch an investigation on its own initiative. The law enforcement officer under investigation must be informed of the name, rank, and command of the law enforcement officer in charge of the investigation, the interrogating officer, and each individual present during an interrogation. Before an interrogation, the law enforcement officer under investigation must be informed in writing of the nature of the investigation. If the officer is under arrest or is likely to be placed under arrest as a result of the interrogation, the officer must be informed completely of all of the officer's rights before the interrogation begins.

Unless the seriousness of the investigation is of a degree that an immediate interrogation is required, the interrogation must be conducted at a reasonable hour, preferably when the officer is on duty. Unless otherwise authorized by the officer under investigation, the interrogation is required to take place (1) at the office of the command of the investigating officer or at the office of the local precinct or police unit in which the incident allegedly occurred, as designated by the investigating officer, or (2) at another reasonable and appropriate place.

The officer under interrogation may not be threatened with transfer, dismissal, or disciplinary action. On request, the officer has the right to be represented by counsel or another responsible representative of the law enforcement officer's choice who must be present and available for consultation at all times during the interrogation. The interrogation must be suspended for a period of up to five business days until representation is obtained. Within that five-business day period, the chief, for good cause shown, may extend the period for obtaining representation. The officer may waive this right to representation.

A complete written, taped, or transcribed record must be kept of the entire interrogation, including all recess periods. Upon completion of the investigation, and on request, a copy of the record of the interrogation must be made available at least 10 days before a hearing.

Testing: The law enforcement agency may order the officer to submit to blood alcohol tests; blood, breath, or urine tests for controlled dangerous substances; polygraph examinations; or interrogations that specifically relate to the subject matter of the investigation. The results are not admissible or discoverable in a criminal proceeding against the law enforcement officer. The results of the polygraph examination may be used as evidence in an administrative hearing if the agency and the officer agree to the admission. If the officer refuses to submit to a test, polygraph examination, or interrogation, the agency may commence an action that may lead to a punitive measure as a result of the refusal.

Investigation File: Upon completion of an investigation and at least 10 days before a hearing, the officer must be (1) notified of the name of each witness and of each charge and specification against the officer and (2) provided with a copy of the investigatory file and any exculpatory information, if the law enforcement officer and the law enforcement officer's representative agree to execute a specified confidentiality agreement. The law enforcement officer must pay a reasonable charge for the cost of reproducing the material.

The law enforcement agency may exclude from the exculpatory information provided to a law enforcement officer (1) the identity of confidential sources; (2) nonexculpatory information; and (3) recommendations as to charges, disposition, or punishment. The agency may not insert adverse material into a file of the officer, except the file of the internal investigation or the intelligence division, unless the officer has an opportunity to review, sign, receive a copy of, and comment in writing on the adverse material. The law enforcement officer may waive this right.

Procedures Following Recommendation for Discipline

Hearing Board Formation: If the investigation or interrogation of a law enforcement officer results in a recommendation of demotion, dismissal, transfer, loss of pay,

reassignment, or similar action that is considered punitive, the law enforcement officer is entitled to a hearing on the issues by a hearing board to contest the agency's action. A law enforcement officer who has been convicted of a felony is not entitled to a hearing.

The law enforcement agency must give notice to the officer of the right to a hearing by a hearing board, which includes the time and place of the hearing and the issues involved. The hearing must be open to the public unless the chief finds a hearing must be closed for good cause, including to protect a confidential informant, an undercover officer, or a child witness.

A hearing board must consist of at least three voting members who are appointed by the chief and chosen from law enforcement officers within that law enforcement agency or another law enforcement agency and have had no part in the investigation or interrogation. At least one member of the hearing board must be of the same rank as the law enforcement officer against whom the complaint is filed.

A chief may appoint, as a nonvoting member of the hearing board, one member of the public who has received training administered by MPTSC on LEOBR and matters relating to police procedures. If authorized by local law, the hearing board may include up to two nonvoting or voting members of the public who have received training by MPTSC on LEOBR and matters relating to police procedures. At the Johns Hopkins University, if authorized by local law, a hearing board *must* include two voting members of the public who have received training administered by MPTSC on LEOBR and matters relating to police procedures.

Alternative Hearing Board: A law enforcement agency or the agency's superior governmental authority that has recognized and certified an exclusive collective bargaining representative may negotiate with the representative an alternative method of forming a hearing board. Subject to certain requirements, a law enforcement officer may elect the alternative hearing method of forming a hearing board.

Subpoenas: In connection with a disciplinary hearing, the chief or hearing board may issue subpoenas to compel the attendance and testimony of witnesses and the production of books, papers, records, and documents as relevant or necessary.

Hearing Board Procedures: The hearing board must give the law enforcement agency and law enforcement officer ample opportunity to present evidence and argument about the issues involved. Each party may be represented by counsel, has the right to cross-examine witnesses who testify, and may submit rebuttal evidence. The standard of proof in a hearing before a board is preponderance of the evidence. An official record, including testimony and exhibits, must be kept of the hearing.

Disposition: After a disciplinary hearing and a finding of guilt, the hearing board may recommend the discipline it considers appropriate under the circumstances, including demotion, dismissal, transfer, loss of pay, reassignment, or other similar actions that is considered punitive. The decision, order, or action taken as a result of a hearing must be in writing and accompanied by findings of fact, including a concise statement on each issue in the case.

The decision of the hearing board as to finding of fact and any discipline is final if (1) a chief is an eyewitness to the incident or (2) a law enforcement agency or the agency's superior governmental authority has agreed with an exclusive collective bargaining representative that the decision is final. The decision of the hearing board may then be appealed.

Within 30 days after receipt of the recommendations of the hearing board, the chief must review the findings, conclusions, and recommendations of the hearing board and issue a final order. If the agency or the agency's superior governmental authority has *not* agreed with an exclusive collective bargaining representative that the hearing board decision is final, the discipline issued by the chief under the final order may, under certain circumstances, diverge from the discipline recommended by the hearing board. The final order may be appealed to the circuit court.

Expungement: On written request, a law enforcement officer may have expunged from any file the record of a formal complaint if at least three years have passed since the final disposition by the law enforcement agency or hearing board and (1) the law enforcement agency that investigated the complaint exonerated the law enforcement officer of all charges in the complaint or determined that the charges were unsustained or unfounded or (2) a hearing board acquitted the law enforcement officer, dismissed the action, or made a finding of not guilty. Evidence of a formal complaint against a law enforcement officer is not admissible in an administrative or judicial proceeding if the officer is eligible for expungement of the formal complaint.

Summary Punishment: Summary punishment may be imposed for minor violations of law enforcement agency rules and regulations if the facts that constitute the minor violation are not in dispute, the law enforcement officer waives the hearing provided under LEOBR, and the law enforcement officer accepts the punishment imposed by the highest ranking law enforcement officer, or individual acting in that capacity, of the unit to which the law enforcement officer is attached. Summary punishment may not exceed suspension of three days without pay or a fine of $150.

Suspension of Police Powers: The chief may impose emergency suspension with pay if it appears that the action is in the best interest of the public and the law enforcement agency. If the law enforcement officer is suspended with pay, the chief may suspend the police

powers of the law enforcement officer and reassign the law enforcement officer to restricted duties pending a determination by a court, with respect to a criminal violation, or a final determination by a hearing board, with respect to a law enforcement agency violation. If a law enforcement officer is charged with a *felony*, the chief may impose an emergency suspension of police powers without pay. A law enforcement officer who is suspended is entitled to a prompt hearing.

Appeal: A law enforcement officer who is denied a right granted by LEOBR may apply to the circuit court of the county where the law enforcement officer is regularly employed for an order that directs the law enforcement agency to show cause as to why the right should not be granted. The court must grant appropriate relief if the court finds that a law enforcement agency obtained evidence against a law enforcement officer in violation of a right granted by LEOBR. A party aggrieved by a decision of a court may appeal to the Court of Special Appeals.