



BERNARD C. "JACK" YOUNG

MAYOR

*Office of Government Relations
88 State Circle
Annapolis, Maryland 21401*

SB 590

February 13, 2020

TO: Members of the Senate Education, Health and Environmental Affairs Committee

FROM: Nicholas Blendy, Deputy Director of Government Relations

RE: Senate Bill 590 - Public Information Act - Revisions

POSITION: FAVORABLE WITH AMENDMENTS

Chair Pinsky, Vice-Chair Kagan, and Members of the Committee, please be advised that the Baltimore City Administration **supports with amendments** Senate Bill (SB) 590.

As written, SB 590 would effectively remove meaningful judicial review of disputes under Maryland's Public Information Act ("PIA") by providing in Bill Section 4-1A-04(a)(3)(I) that the PIA Compliance Board can order production of a government record with no ability to challenge that order. The bill should be amended to clarify that a record custodian can either comply with that order or seek judicial review of it in Circuit Court. Otherwise, the government would be forced to disclose a record prior to challenging the disclosure in Circuit Court, thereby making the PIA Compliance Board the only forum for PIA disputes. While such an administrative forum works in the context of the Open Meetings Compliance Board that does not find facts, the PIA Compliance Board would be tasked with applying the law to the records at issue in each request, without any rules of evidence, ability to compel testimony or the safeguards of *in camera* inspection. The requested amendment would allow disputes that require judicial review to meaningfully receive it.

Section 4-1A-06(b)(4) provides that the PIA Compliance Board will keep confidential only those records or information "that is not a public record." Since every record about government operations is considered a public record under PIA Section 4-101, the confidentiality provided by this bill is ineffective. The Bill should be amended to clarify that any records or information provided to the PIA Compliance Board will be kept confidential. It should also be amended to provide that the records of the Ombudsman and the PIA Compliance Board are not themselves subject to disclosure under the Public Information Act.

Similarly, an amendment is needed to Bill Section 4-1B-04(d)(2) so that it is clear that the records disclosed to the Ombudsman and the PIA Compliance Board that are to be shared with others in the Attorney General's Office are confidential under Bill Section 4-1A-06(b)(4) and not subject to

disclosure in response to a PIA request to the Attorney General's Office. It should also be noted that governments will not be able to share with the Attorney General, the PIA Compliance Board or the Ombudsman any records that are required to be kept confidential by operation of federal laws that do not recognize the state government as a permissible recipient of the record. *See, e.g.*, 20 U.S.C. 1230(j)(1)(Federal Family Educational and Privacy Rights Act requires Attorneys General of states to apply to a "court of competent jurisdiction" to permit access to educational records).

An amendment is also suggested for Bill Section 4-1A-06(b)(3), which mandates that a government or requestor give an affidavit setting forth "a statement of facts that are at issue in the complaint." Such an affidavit becomes a statement of a party opponent under Maryland Rule of Evidence 8-502.1. While this may appear to give the PIA Compliance Board the ability to evaluate testimony, it lacks any of the other safeguards present in the Maryland Rules. The PIA Compliance Board would not be able to evaluate the relevancy or completeness of such an affidavit, nor would the other party in the dispute be able to cross-examine the affiant. It is unclear what government agency or employee would be required to give the affidavit as the Maryland Rules' provisions on corporate designees would not apply. In short, this type of testimony is properly handled in Circuit Court and the Bill should be amended to remove the requirement that affidavits be provided.

Additionally, the bill gives sweeping regulatory power to the PIA Compliance Board by allowing it to enact regulations for the entirety of Title 4, which includes all PIA exemptions. This makes the PIA Compliance Board the judiciary, allowing it to opine on the proper interpretation of every exemption. One need only look at the volume of cases handled by the Federal District Courts concerning the Federal Freedom of Information Act to realize that regulations on these exemptions would be inappropriate if not impossible. The bill should be amended to clarify that the PIA Compliance Board's regulatory power is over Subtitles 1a and 1b of Title 4 that deal with the PIA Compliance Board and the Ombudsman, respectively, thereby allowing for regulations over the process of dispute resolution and other matters within their control, not the scope or interpretation of the exemptions, which are the proper providence of the legislative or judicial branches of government.

The bill should be amended to clarify the meaning of "unreasonable failure to waive a fee" in Bill Section 4-1A-04(a)(3)(III) to give governments guidance on what kind of requests for fee waivers would be reviewable by the PIA Compliance Board. As written the bill deletes the brackets around the words "order the custodian to" in that same Section, which effectively eviscerates this provision because the Compliance Board was not the entity that charged the fee in the first instance. The language in the brackets should be retained in order to give the Board power to order a fee reduction. An amendment would also be helpful to clarify that "failure to respond to a request" in Bill Section 4-1A-06(b)(2)(I) captures only those requests where the government has failed to send the required initial 10-day letter.

Finally, the bill should remove the ability of the PIA Compliance Board to prevent a government from charging a fee if the response to a request is deemed late. The more voluminous a request, the more time it takes to search for and compile the records making it more likely a record custodian may be a few days late in its response. The bill could be clarified to provide that the fee be eliminated only in the situation that the government failed to send any documents within 30 days.

We respectfully request a **favorable with amendments** report on Senate Bill 590.