

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 712 (Delegate Rosenberg)
Health and Government Operations

Public Information Act - Denials - Confidential Information

This bill prohibits a custodian of a public record from denying inspection of the part of a public record that contains information regarding a trade secret or specified confidential information unless the disclosure of the information is likely to result in substantial competitive harm to the person from which the information was obtained. The bill also establishes that a custodian of a public record may only deny inspection of the part of the record owned by the Maryland Technology Development Corporation (TEDCO) or of specified records of a public institution of higher education if disclosure of the information is likely to result in substantial competitive harm to the entity that owns the information.

Fiscal Summary

State Effect: State expenditures (all funds) increase beginning FY 2025, potentially significantly, to the extent State entities respond to an increased number of lawsuits challenging Maryland’s Public Information Act (PIA) determinations; however, a reliable estimate is not feasible, as discussed below. Revenues are not directly affected.

Local Effect: Although a reliable estimate of the bill’s impacts on local finances cannot be made at this time, the bill may result in an increase in local expenditures for the same reasons that State expenditures may increase. Local revenues are not affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: With respect to public institutions of higher education, the bill applies only to records related to collaborative research with the private sector, the development

and commercial application of institution-owned intellectual property, and the provision of technical assistance.

Current Law: 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.

Duties of Custodians

Generally, a custodian of a public record must permit inspection of any public record at any reasonable time. A custodian must designate types of public records that are to be made available to any applicant immediately on request and maintain a current list of the types of public records that have been so designated. Each custodian must adopt reasonable rules or regulations that, consistent with PIA, govern timely production and inspection of a public record. Chapter 658 of 2021, effective July 1, 2022, requires each official custodian to adopt a policy of proactive disclosure of public records that are available for inspection under PIA, as specified.

Denials

Required Denials: 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 requires denial of inspection for specified personal and confidential records and information, including, for example, personnel and student records, hospital records, specified medical and financial information, and shielded criminal and police records. Chapter 62 of 2021 specifies that a record relating to an administrative or criminal investigation of misconduct by a police officer is not a protected personnel record under PIA and requires a custodian to allow access to such records by federal and State prosecutors.

Among other required denials, a custodian must deny inspection of the part of a public record that contains (1) a trade secret; (2) confidential commercial information; (3) confidential financial information; or (4) confidential geological or geophysical information.

Discretionary Denials: Unless otherwise specified, if a custodian believes that inspection of a part of a public record by an applicant would be contrary to the public interest, the custodian may deny inspection to the applicant of that part of the record. PIA specifies the

types of records and information that are eligible for discretionary denials, including documents that would not be available through discovery in a lawsuit.

Among other discretionary denials, a custodian may deny inspection of the part of a public record that contains information disclosing or relating to specified confidential trade secrets and confidential commercial and financial information owned in whole or in part by TEDCO or a public institution of higher education, 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.

Office of the Public Access Ombudsman

The Office of the Public Access Ombudsman reviews and resolves disputes between applicants and custodians over requests for public records. The ombudsman may not compel a custodian to disclose public records or redacted information. However, if an applicant files a complaint with the office challenging a denial or exemption, the custodian must demonstrate that the denial or exemption is clearly applicable to the requested public record and, if inspection of part of a public record is denied on a discretionary basis, that the harm from disclosure is greater than the public interest in access to the information.

Public Information Act Compliance Board

The Public Information Act Compliance Board (PIACB), a five-member board appointed by the Governor, receives, reviews, and resolves complaints from applicants alleging that a custodian of a public record charged an unreasonable fee of more than \$350. The board must issue a written opinion as to whether a violation occurred and, if it finds that a custodian charged an unreasonable fee, order the custodian to reduce the fee and refund the difference, as specified.

Chapter 658 of 2021, effective July 1, 2022, expands the jurisdiction of the board to include receiving, reviewing, and resolving additional types of PIA disputes and institutes an integrated PIA compliant resolution process that includes the Public Access Ombudsman. Under the Act, an applicant, an applicant's designee, or a custodian may file a written complaint with PIACB if (1) the complainant has attempted to resolve the dispute through the Office of the Public Access Ombudsman and (2) the ombudsman has issued a final determination stating that the dispute was not resolved.

Judicial Review: Generally, a complainant or custodian may appeal a decision of PIACB to the circuit court. An appeal must be filed with the circuit court for the county where the complainant resides or has a principal place of business or the public record is located. An appeal automatically stays the board's decision pending the circuit court's decision. A defendant governmental unit is liable to the complainant for statutory damages and actual damages that the court considers appropriate if the court finds that any defendant knowingly and willfully failed to (1) disclose or fully disclose a public record to which the complainant was entitled to inspect or (2) provide a copy, printout, or photograph of a public record that was requested, as specified. Statutory damages may not exceed \$1,000. In limited circumstances, an official custodian may be liable for actual damages and subject to disciplinary action. If the court determines that the complainant has substantially prevailed, the court may assess against a defendant governmental unit reasonable counsel fees and other litigation costs that the complainant reasonably incurred. A party who is aggrieved by a final judgement of a circuit court in a proceeding for judicial review of a decision issued by PIACB may appeal to the Appellate Court of Maryland, as specified.

State/Local Expenditures: The bill does not define "substantive competitive harm." Though State and local government custodians of public records typically make determinations as to fully deny or deny part of a public record, as required under current law, the lack of a definition that establishes "substantive competitive harm" to the person from which the information was obtained (as specified under the bill) may result in information that otherwise would be confidential to be released. Similarly, the bill also makes it more likely, given the lack of a clear standard, that information that is subject to release is not released out of an abundance of caution on the part of custodians.

As the records specified under the bill are generally related to confidential business information, PIA requestors and persons from which the information was obtained may be more likely to file litigation against the government entity that made the determination to either release or deny the PIA request.

Therefore, expenditures (all funds) for State entities increase, potentially significantly, to the extent they must respond to additional PIA complaints and litigation. Similarly, local government expenditures increase as they respond to PIA litigation. However, the Department of Legislative Services cannot independently estimate those costs as any resulting expenditures depend on the number of PIA complaints and subsequent litigation is filed as a result of the bill.

OAG and the Judiciary advise that they can handle any increase in volume of court cases resulting from any potential increase in PIA litigation within existing budgeted resources.

The bill may also result in fewer persons wanting to do business with the State for fear that their trade secrets and confidential information contained in bids, proposals, or work

products may be released to competitors. The practical and fiscal effects of such behavior cannot be reliably estimated but may be substantial.

Small Business Effect: Any small business that typically does business with the State or receives financial support from the State may be less likely to do business or apply for assistance to avoid having trade secrets or confidential business information released to competing businesses.

Additional Information

Recent Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: None.

Information Source(s): Department of Commerce; Maryland Environmental Service; Baltimore City; Harford and Talbot counties; Maryland Association of Counties; City of Frostburg; Maryland Municipal League; Maryland Cannabis Administration; Office of the Attorney General; Comptroller's Office; Judiciary (Administrative Office of the Courts); Baltimore City Community College; University System of Maryland; Morgan State University; Maryland Department of the Environment; Department of General Services; Maryland Department of Health; Department of Housing and Community Development; Department of Human Services; Maryland Department of Labor; Board of Public Works; Maryland Department of Transportation; Maryland Health Benefit Exchange; Maryland Insurance Administration; Maryland State Lottery and Gaming Control Agency; Public Service Commission; State Retirement Agency; Maryland Stadium Authority; Department of Legislative Services

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