

Department of Legislative Services  
Maryland General Assembly  
2012 Session

**FISCAL AND POLICY NOTE**

Senate Bill 592 (Senator Pinsky)  
Education, Health, and Environmental Affairs

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

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This bill authorizes a custodian of a public record to deny inspection under the Maryland Public Information Act (MPIA) of a public record that (1) was produced or collected by a faculty member of a public institution of higher education; (2) was created within the faculty member's scope of employment; (3) is related to the faculty member's field of discipline and duties related to that field of discipline, including the general obligation of a faculty member to teach, do creative work, or conduct research; and (4) has not been publicly released, published, or copyrighted.

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**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.

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**Analysis**

**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 similar legislation. 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 sent to 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:** Although designated as a cross file, HB 62 (Delegates Rosenberg and Reznik – Health and Government Operations) is not identical.

**Information Source(s):** Baltimore City Community College, Maryland Higher Education Commission, Morgan State University, University System of Maryland, Department of Legislative Services

**Fiscal Note History:** First Reader - February 27, 2012  
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