

Department of Legislative Services
 Maryland General Assembly
 2015 Session

FISCAL AND POLICY NOTE

House Bill 867 (Delegate Carter, *et al.*)
 Health and Government Operations

Public Information Act - State Public Information Act Compliance Board and
 State Policy

This bill establishes the State Public Information Act Compliance Board. The bill specifies the board’s membership and duties, including enforcement of the Maryland Public Information Act (MPIA). The board must report to the Governor and General Assembly by October 1 of each year. The Office of the Attorney General (OAG) must staff the board.

The bill also requires, to the extent practicable, each unit and instrumentality of the State or of a political subdivision to publish public records online, as specified.

Fiscal Summary

State Effect: General fund expenditures increase by \$70,200 in FY 2016 for OAG to provide staff support for the board. The bill could also have a significant operational and/or fiscal impact on State agencies, as discussed below. Revenues are not materially affected.

(in dollars)	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	70,200	83,700	87,600	91,600	95,800
Net Effect	(\$70,200)	(\$83,700)	(\$87,600)	(\$91,600)	(\$95,800)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: The bill could have a significant impact on local government operations.

Small Business Effect: Minimal.

Analysis

Bill Summary:

Online Publishing of Public Records

The bill requires, to the extent practicable, that each unit and instrumentality of the State or of a political subdivision (1) proactively release public records online in formats that are usable and easily accessible by members of the general public; (2) create a public and comprehensive list of all public records held by the unit or instrumentality; (3) digitize and post archived materials online; and (4) release a public record as soon as it is created.

State Public Information Act Compliance Board – Membership

The board consists of three members; at least one member must be an attorney admitted to the Maryland Bar. The Governor must appoint members with the advice and consent of the Senate and must also appoint the board's chair. Board members serve for three years and may not serve for more than two consecutive terms. Initial terms expire as follows: one member on June 30, 2017; one member on June 30, 2018; and one member on June 30, 2019.

Board members may not receive compensation but are entitled to reimbursement for standard travel expenses.

Board Duties

The board must receive, review, and resolve complaints alleging that a custodian of a public record (1) denied inspection of a public record in violation of the MPIA or (2) charged an unreasonable fee of more than \$500. The board must issue a written opinion as to whether a violation occurred and order the custodian to produce the record or reduce the fee and refund the difference, as appropriate. The board must adopt regulations to implement the bill, study ongoing compliance by custodians, and make recommendations for improvements.

By October 1 of each year, the board must report to the Governor and General Assembly on the board's activities, the board's opinions, the number and nature of complaints filed with the board, and any recommendations.

Complaints and Board Opinions

Any person may file a complaint with the board that a custodian denied inspection of a public record in violation of the MPIA or charged an unreasonable fee of more than \$500.

The complaint must contain specified information, including the identity of the custodian and the date and circumstances of the custodian's actions.

After receiving a complaint, the board must send the complaint to the identified custodian and request a response. The custodian must send a response within 30 days after receiving the complaint. On request by the board, the custodian must include specified information with the response, including the basis for the custodian's initial action and a copy of the public record, as appropriate. If the board does not receive a response within 45 days after sending the notice, the board must decide the case on the facts before the board.

If the board receives sufficient information in the complaint and the response, the board must issue a written opinion on the disposition of the case within 30 days after receiving the response. If the board is unable to reach a determination, the board may schedule an informal conference with the complainant, the custodian, and any other person with relevant information. The board must issue a written opinion within 30 days after the informal conference. If the board is not able to issue an opinion within these time limits, the board must state in writing the reason for the inability to issue an opinion and then issue an opinion as soon as possible but no later than 90 days after the complaint was filed.

The board may send custodians any written opinions that will provide custodians with guidance on compliance with the MPIA.

A custodian's compliance with an order of the board is not an admission of a violation and may not be used as evidence in a civil proceeding.

The bill repeals specified provisions of law that allowed a person to seek administrative review if denied inspection of a public record by a unit is subject to Title 10, Subtitle 2 of the State Government Article.

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. MPIA authorizes judicial review of the denial of a request to inspect a public record. Judicial reviews of denials occur in the circuit court where the records are located or where the complainant resides or has a place of business. These cases are required to take precedence on the docket, unless the court has other cases it considers of greater importance.

Generally, a custodian of a public record must permit inspection of the record at a reasonable time.

A custodian has to 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. Denial of inspection is also mandatory for public records relating to adoption, welfare records, letters of reference, specified information about an individual maintained by a library, retirement records, certain police records, criminal charging documents, arrest warrants, personnel records, certain hospital and school records, records of certain State agencies, certain recorded and surveillance images, and captured plate data collected by automatic license plate reader systems. Denial of inspection is required for information in a public record relating to certain medical, psychological, sociological, and financial information; trade secrets; certain personal information about public employees; information about the security of an information system; and licensing records.

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. Permissible denials include information relating to documents that would not be available through discovery in a lawsuit, certain information about publicly administered tests, research projects conducted by an institution of the State or a political subdivision, real estate appraisals of property to be acquired by the State prior to its acquisition, certain information on inventions owned by State public higher educational institutions, and trade secrets or confidential information owned by the Maryland Technology Development Corporation.

A custodian must provide an applicant who is authorized to inspect a public record with a copy, printout, or photograph of the public record, or provide the applicant with access to the public record to make the copy, printout, or photograph, upon the applicant's request. A custodian must provide the copy in a searchable and analyzable electronic format if the public record is in that format, the applicant requests the copy in that format, and the custodian is able to provide a copy in that format without disclosing confidential or protected information or information that the custodian has decided should not be inspected.

An official custodian may charge a reasonable fee for the search, preparation, and reproduction of a public record. The official custodian may not charge a fee for the first two hours that are needed to search for a public record and prepare it for inspection. If another law sets a fee for a copy of a public record, that law applies; however, the official custodian may otherwise charge any reasonable fee for making or supervising the making of a copy. The official custodian may also charge for the cost of providing facilities for the reproduction of the public record if the custodian did not have the facilities. The fee may be waived if the applicant asks for a waiver and the official custodian, after considering the ability of the applicant to pay the fee, determines that the waiver would be in the public interest.

A custodian must grant or deny an application to inspect a public record promptly, but no more than 30 days after receiving the application. Upon approving the application, the custodian must produce the public record immediately or within a reasonable period needed to retrieve the record, but not more than 30 days after receipt of the application. If the custodian denies the application, the custodian must (1) immediately notify the applicant; (2) within 10 working days, provide a written statement that includes specified information, including the basis for the denial; and (3) allow inspection of any part of the record that is subject to inspection and is reasonably severable. These time limits may, upon the applicant's consent, be extended for up to 30 days.

Background: The State Public Information Act Compliance Board (PIACB) is modeled after the Open Meetings Compliance Board (OMCB). The bill is intended to establish an appeals process for individuals who receive a denial under the MPIA or who are charged a fee of \$500 or greater under MPIA. The goal of the bill is to create a centralized appeals process for all MPIA requests.

The Office of the Attorney General also staffs OMCB, keeps minutes, has produced an Open Meetings Act Manual, and publishes opinions of OMCB. PIACB differs from the OMCB in that OMCB are advisory only; OMCB may not require or compel any specific actions of the public body beyond requiring the public body to acknowledge any violations. According to the 2014 OMCB annual report, 32 complaints were submitted to the board in fiscal 2014.

Based on a review of available reports on open government laws in other states, the Department of Legislative Services observed several substantial variations among jurisdictions, including variations in (1) the ratio of open meetings complaints to public information complaints; (2) the enforcement and review process for state laws equivalent to MPIA; and (3) the role of the committees and offices, *e.g.*, some jurisdictions provide a formal appeals proceeding for complaints through designated offices and committees devoted to open government laws, while other jurisdictions require the designated offices and committees to field more general inquiries concerning open government laws. The following provides examples of experiences in other jurisdictions:

- In Hawaii, the Office of Information Practices administers the state's equivalent to the MPIA, the Uniform Information Practices Act (UIPA) and the state's Open Meetings Act (OMA) equivalent, the Sunshine Law. According to the office's fiscal 2013 annual report, the office fielded 1,227 formal and informal requests for assistance, including 177 formal requests. The office received 34 UIPA appeals by requesters who had been denied access to all or part of a requested record by an agency and 27 Sunshine Law complaints and requests for investigations and rulings concerning open meeting issues.

- In Illinois, the Public Access Counselor within the Office of the Attorney General, reviews matters dealing with the state's Freedom of Information Act (FOIA) and the state's OMA. According to the Public Access Counselor's 2012 annual report the office received 3,119 FOIA formal requests for review and 288 OMA requests for formal review.
- In New York, the Department of State Committee on Open Government provides advice on the Freedom of Information Law (FOIL), the Open Meetings Law, and the Personal Privacy Protection Law. According to the committee's 2013 annual report, committee staff prepared 141 advisory opinions, with 87 opinions pertaining to FOIL. It is not clear how the remaining opinions were distributed across the remaining categories.
- In Rhode Island, the Open Government Unit of the Office of the Attorney General investigates complaints for violations of the state OMA and the Access to Public Records Act (APRA). In 2012, the unit investigated 78 open government complaints and issued 41 findings under OMA and 34 findings under APRA.
- In Tennessee, the Office of Open Records Counsel fields inquiries and provides advisory opinions on issues related to access of local government records under the Tennessee Public Records Act. The advisory committee on open government provides guidance and advice for the office of open records counsel. According to the 2014 Office of Open Records Counsel and Advisory Committee on Open Government Annual Report to the General Assembly, the office and committee received 1,697 total inquiries, including 816 from citizens, 138 from media, and 743 from the government. According to the report, 1,432 inquiries concerned public records, while 216 concerned open meetings, and 37 concerned meetings and records. Forty complaints were filed regarding alleged open meetings violations.

Due to the variations in processes and inconsistency in how information is reported, it is not optimal to utilize experiences in other states to project potential statistics for the newly established board under the bill.

The bill will likely impact the amount of MPIA-related hearings held by the Office of Administrative Hearings. In 2012 and 2013, the Office of Administrative Hearings held 15 MPIA-related hearings each year.

State Fiscal Effect: General fund expenditures increase by \$70,185 in fiscal 2016, which accounts for the bill's October 1, 2015 effective date. This estimate reflects the cost of OAG hiring one-half of an additional assistant Attorney General and one-quarter of a support staff/administrative aide position to provide staff for the board. It includes salaries,

fringe benefits, one-time start-up costs, and ongoing operating expenses. The estimate assumes PIACB receives a substantially similar amount of complaints as OMCB. Due to the bill's streamlined process, PIACB may receive significantly more complaints than the number of hearings that the Office of Administrative Hearings has historically held. However, because such a process does not yet exist in the State, the actual amount of complaints cannot accurately be determined.

Positions	0.75
Salaries and Fringe Benefits	\$61,286
Operating Expenses	<u>8,899</u>
Total FY 2016 State Expenditures	\$70,185

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

Additionally, several State agencies advise that the bill's provisions relating to the availability of public records online may have significant operational and/or fiscal impacts for agencies. The bill requires State agencies to proactively release public records online, create lists of public records, digitize and post archived materials online, and release public records as soon as they are created. Although these requirements are mandated "to the extent practicable," State agencies nevertheless advise that implementing these provisions in practice may be labor intensive and/or cost prohibitive. Some State agencies, including the Judiciary and the Department of Public Safety and Correctional Services, maintain thousands of sensitive public records that would need to be redacted before being made available online; several other agencies also express concern at the practicality of screening and redacting records in a timely enough manner to meet the bill's requirements. Additionally, several agencies advise that digitizing public records, especially archived records, may be costly and time-consuming for existing staff; some agencies may require additional personnel to meet the increased workload.

The extent of the operational and/or fiscal impact depends on the number of public records maintained by each agency and the sensitivity/complexity of the public records at issue.

Local Fiscal Effect: Similar to State agencies, local governments could also experience operational and/or fiscal impacts from the bill's provisions relating to the availability of public records online; however, the extent of the impact would also depend on the number and sensitivity/complexity of the public records maintained by each local governmental unit.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore City; cities of Bowie and Takoma Park; Montgomery and Howard counties; Office of the Attorney General; Maryland Department of Agriculture; Department of Business and Economic Development; Department of Budget and Management; Department of Natural Resources; Maryland State Department of Education; Maryland Department of the Environment; Governor's Office; Department of General Services; Department of Housing and Community Development; Maryland Higher Education Commission; Department of Disabilities; Maryland Insurance Administration; Judiciary (Administrative Office of the Courts); Department of Juvenile Services; Department of Labor, Licensing, and Regulation; Department of State Police; Maryland Department of Aging; Department of Public Safety and Correctional Services; Maryland Department of Transportation; University System of Maryland; Department of Legislative Services

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