

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 788 (Senator Kagan, *et al.*)
Education, Health, and Environmental Affairs

Public Information Act - Revisions

This bill modifies the Public Information Act (PIA) to specify the circumstances under which a custodian of records must deny or allow inspection of a recording from a “personal surveillance video” device worn by a law enforcement officer. The bill also requires a custodian to deny inspection of specified distribution lists and limits inspection of specified personal information of an individual to a “person in interest,” regardless of whether or not the individual is deceased. **The bill takes effect June 1, 2018.**

Fiscal Summary

State Effect: The bill’s requirements can be handled with existing budgeted resources, as discussed below. Revenues are not affected.

Local Effect: Some local governments may experience an operational impact or incur an increase in costs to hire additional personnel. Local revenues are not affected.

Small Business Effect: None.

Analysis

Bill Summary:

Inspection of Personal Surveillance Video

Subject to the exceptions specified below, a custodian of records must deny inspection of that part of a recording from a personal surveillance video device worn by a law enforcement officer regarding an incident that:

- depicts a victim or information that could identify a victim of domestic violence;
- depicts a victim or information that could identify a victim of a rape or other sexual assault crime;
- depicts a victim or information that could identify a victim of Title 3, Subtitle 6 of the Criminal Law Article (Abuse and Other Offensive Conduct), except for a crime of hazing where the victim is an adult;
- depicts the death of a law enforcement officer, a firefighter, an emergency medical technician, or an employee of a unit or an instrumentality of the State or a political subdivision that occurred in the performance of the individual's duties; or
- does not result in (1) the arrest, attempted arrest, temporary detention, attempted temporary detention, search, attempted search, citation, death, or injury of an individual; (2) the use of force against an individual; or (3) a complaint or allegation of officer misconduct made against any law enforcement officer involved in the incident.

A custodian of records must deny inspection of records in accordance with the bill regardless of a subsequent action taken by law enforcement or a court resulting from the incident recorded. The bill's provisions do not apply to a public record that has been entered into evidence in a court proceeding and may not be construed to affect the discovery or evidentiary rights of a party to a civil suit or criminal prosecution.

A victim who is the subject of a record that is denied inspection must be notified of all requests to inspect the record. The Maryland Police Training and Standards Commission (MPTSC), in consultation with the Maryland Association of Counties, the Maryland Municipal League, law enforcement agencies, victim rights advocates, the press, and other stakeholders, must develop uniform standards and procedures to carry out the bill's provisions regarding victim notification.

A custodian of records must allow inspection of a recording from a personal surveillance video by an individual who is a person in interest. A custodian of records may not allow copying of a recording from a personal surveillance video by an individual who is allowed to inspect the recording under the bill's provisions and who is under investigation for, or charged with, received probation before judgement for, is subject to a peace or protective order as a result of, pleaded *nolo contendere* to, pleaded guilty to, or has been found guilty of a violation specified above, if the recording is of the incident leading to the investigation, probation before judgment, order, charge, plea, or verdict.

“Personal surveillance video” means audio or video recorded by a device attached to or designed to follow a law enforcement officer, a firefighter, an emergency medical technician, or an employee of a unit or an instrumentality of the State or a political subdivision. The definition includes video and audio recorded by a:

- body-worn digital recording device; or
- drone or robot following a law enforcement officer, a firefighter, an emergency medical technician, or a State or local government employee, as specified.

The term *does not* include video and audio recorded by (1) a camera mounted on an automobile, a truck, or a similar vehicle or (2) a surveillance camera mounted at a stationary location.

Inspection of Email Distribution Lists

The bill requires a custodian to deny inspection of a distribution list and a request to be added to a distribution list if that list identifies a physical or email address or a telephone number of an individual that is used by a governmental entity or an elected official for the sole purpose of (1) periodically sending news about the official activities of the governmental entity or elected official or (2) sending informational notices or emergency alerts.

Inspection of Certain Personal Information

The bill limits inspection of an individual's Social Security number or birthdate only to a person in interest, regardless of whether or not the individual is deceased.

Current Law:

Maryland's Public Information Act, Generally

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 who 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: A custodian of a public record must designate types of public records that are to be made available to any applicant immediately on request and must maintain a current list of the types of public records that have been so designated. Generally, a custodian of a public record must permit inspection of the record at a reasonable time and within 10 working days of receiving a request.

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. Denial of inspection is also mandatory for public records relating to adoption, welfare records, hospital 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.

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 that are eligible for discretionary denials, including documents that would not be available through discovery in a lawsuit.

A custodian that denies inspection of a public record on this basis must provide (1) a written statement to the applicant giving the reason for denial; (2) the legal authority on which it is based; (3) a brief description of the undisclosed record (without disclosing the protected information), including an explanation of why redacting information would not address the reason for the denial; and (4) a notice of the statutory remedies available.

Person in Interest: For purposes of PIA, “person in interest” means a person or governmental unit that is

- the subject of a public record;
- a designee of the person or governmental unit; or
- in the case of a person that has a legal disability, the parent or legal representative of the person.

Background:

Body-worn Cameras in Maryland: The bill’s provisions apply to body-worn cameras (BWCs). Chapters 128 and 129 of 2015 established the Commission Regarding the Implementation and Use of Body Cameras by Law Enforcement Officers. Through examination of model policies and discussion, the commission compiled a list of best practices for BWCs and submitted a report to the Police Training Commission – now known as MPTSC – and the General Assembly on September 16, 2015.

The commission's [report](#) addresses (1) procedures for testing and operating equipment, including when BWCs must be activated and when use is prohibited; (2) notification responsibilities of law enforcement officers to individuals being recorded; (3) confidentiality and ownership of data; (4) procedures and requirements for data storage; (5) review of recordings by parties in interest; and (6) establishment of retention periods, release of recordings as required by PIA, and development of written policies for BWC usage consistent with State law and regulations, as specified.

In addition, the commission recommended that the General Assembly consider amending PIA to incorporate provisions specifically governing the release of audio/video recordings captured by BWCs, including recordings depicting victims of violent crimes and domestic abuse.

Activity in Other States: According to the National Conference of State Legislatures, 23 states and the District of Columbia have addressed how BWC data is to be released to the public under open record. In statute, states specify procedures for the public to request footage and which footage is and is not to be released to the public. The goal of these provisions is to be transparent in law enforcement without unnecessarily infringing on privacy.

Specifically, laws in Connecticut, Nevada, North Dakota, Oklahoma, and Texas treat BWC recordings as public records but provide standards and caveats for when police may withhold, redact, or obscure certain videos. Connecticut excludes specific incidents from its open records laws, including footage containing communication between police officers and undercover officers or informants, any medical or psychological treatment, and victims of domestic or sexual abuse, homicide, suicide, or accidental death. Oklahoma's law allows footage containing the death of a person, or violence against a person, to be redacted, unless the harm was caused by law enforcement. Texas' law provides that only BWC footage that is used, or could be used, as evidence in a criminal proceeding is subject to the state's open record law and specifically prohibits the release of any footage taken in a private place or that contains behavior that did not result in an arrest and would only be a misdemeanor punishable by a fine. In addition, North Dakota makes any recording made in a private place by a police officer's or firefighter's BWC exempt from the state's open records law.

State laws also address how much video data a requester may access and what standards must be met to access the data. For example, Nevada's law requires that video be requested on a per incident basis, and enables law enforcement to only provide the information at the location the video is being stored if it contains confidential information that cannot otherwise be redacted. Texas addresses how to respond to requests for large amounts of data. The law defines a "voluminous public information request" as a request for recordings that includes more than five separate incidents, more than five separate requests

from the same person in a 24-hour period, or a request that totals more than five hours of footage. Under the law, such requests are answered adequately if they are responded to within 20 business days.

Application of PIA to Personal Surveillance Video: PIA was largely created to handle paper documents and was only recently updated to better handle static electronic records. However, PIA still does not currently address the practical, technical, and privacy challenges facing governments from potential requests of hundreds of hours of accumulated BWC video, all of which must be subjected to attorney review and redaction when appropriate. In light of such challenges, many states are working to strike a balance between affected people having proper access to the footage while preventing overbroad, abusive, or invasive requests.

Application of PIA to Distribution Lists: Application of PIA to the email distribution lists of government organizations has raised some concern regarding the balance between the privacy of individuals and government transparency as electronic communications by government units grow. In 2012, the Carroll County Board of Commissioners received a request under PIA for a large email distribution list used by the commissioners to communicate with individuals who sign up for notifications or who actively correspond with the board. After the board disclosed the distribution list, it was posted publicly on the Internet. There was some concern that disclosure of the email addresses and their subsequent publication could potentially expose the individuals on the list to cybertheft or other fraudulent online activity.

According to a 2012 Attorney General opinion, PIA does not permit records custodians “to unilaterally withhold an email address solely on the grounds that disclosure would substantially harm the public interest.” However, “official custodians may temporarily withhold or partially redact a personal email address on public interest grounds alone, pending a court’s review.”

In 2014, after a hearing, a circuit court judge ordered the Carroll County Board of Commissioners to comply with a subsequent PIA request for distribution lists, which was originated by several news organizations. The court concluded that the board failed to prove that releasing them “would cause substantial injury to the public interest.”

State Expenditures: Several State agencies, as custodians of records, indicate that they can implement the bill with existing budgeted resources. Specifically, OAG, the Administrative Office of the Courts, the Department of Natural Resources, the Department of State Police, the Maryland Department of Transportation, the Maryland Department of Health, and the University System of Maryland all indicate that they can implement the bill with existing resources.

MPTSC, within the Department of Public Safety and Correctional Services, advises however that the development of uniform standards and procedures to implement the bill's provisions regarding victim notification requires a part-time consultant on contract from October 1, 2018, to September 30, 2019, at an estimated cost of \$45,250. The Department of Legislative Services disagrees and advises that this requirement can likely be handled with existing resources. The requirement to develop standards and procedures in conjunction with other entities is not burdensome. Assistance can be drawn from the Maryland Association of Counties, the Maryland Municipal League, law enforcement agencies, the press, victims' rights advocates, and other stakeholders in developing the standards and procedures.

Local Expenditures: While some of the jurisdictions surveyed advise that the bill has no fiscal impact, some noted impacts ranging from a minimal operational impact to a potential significant increase in local expenditures. For example, Montgomery County reports that it will take additional staff time to track and identify victims who must be notified of PIA requests of records of which they are the subject. Anne Arundel County advises that, while its county law enforcement agencies do not currently have any type of personal surveillance video, implementing the bill's requirements could have an operational effect and, as a result, increase expenditures in future years should its agencies acquire the devices. Dorchester County advises that implementing the bill's notification and redaction requirements may require a part-time position. In addition, the Maryland Municipal League advises that some local jurisdictions could incur significant costs to review and redact recordings.

Additional Information

Prior Introductions: SB 970 of 2017, a similar bill, received an unfavorable report from the Senate Judicial Proceedings Committee. Its cross file, HB 767, passed the House as amended but received an unfavorable report from the Senate Judicial Proceedings Committee. HB 947 of 2016, a similar bill, passed the House with amendments and was referred to the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, SB 930, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken.

Cross File: HB 1638 (Delegate Sydnor, *et al.*) - Health and Government Operations and Judiciary.

Information Source(s): Anne Arundel, Dorchester, Garrett, and Montgomery counties; Maryland Association of Counties; Judiciary (Administrative Office of the Courts); Office of the Attorney General; Maryland Department of Health; Maryland Department of Transportation; Department of Natural Resources; Department of Public Safety and

Correctional Services; Department of State Police; University System of Maryland; Maryland Municipal League; National Conference of State Legislatures; Department of Legislative Services

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Analysis by: Michelle Davis

Direct Inquiries to:
(410) 946-5510
(301) 970-5510