

Department of Legislative Services
 Maryland General Assembly
 2020 Session

FISCAL AND POLICY NOTE
 First Reader

Senate Bill 590 (Senators Kagan and Lam)
 Education, Health, and Environmental Affairs

Public Information Act - Revisions

This bill (1) expands the jurisdiction of the Public Information Act Compliance Board (PIACB) to include additional types of Public Information Act (PIA) disputes; (2) institutes an integrated PIA complaint resolution process that includes the Public Access Ombudsman (Ombudsman); (3) requires a custodian to adopt a specified proactive disclosure policy; (4) establishes specified staffing requirements for the Office of the Attorney General (OAG); and (5) makes several additional revisions to PIA. **The bill takes effect July 1, 2020.**

Fiscal Summary

State Effect: General fund expenditures increase by \$148,000 in FY 2021, as discussed below. Future year expenditures are annualized and reflect ongoing costs. Revenues are not materially affected, as discussed below.

(in dollars)	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	148,000	177,400	181,700	188,000	194,500
Net Effect	(\$148,000)	(\$177,400)	(\$181,700)	(\$188,000)	(\$194,500)

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

Local Effect: The bill’s requirements can likely be handled with existing local government resources, as discussed below. Revenues are not materially affected, as discussed below.

Small Business Effect: None.

Analysis

Bill Summary:

Required Policy

Each official custodian must adopt a policy of proactive disclosure of public records available for inspection under PIA. The adopted policy may (1) vary as appropriate to the type of public record and to the staff and budgetary resources of the governmental unit and (2) include publication of public records on the website of the governmental unit or publication of prior responses to PIA requests.

Required Report

By July 1 annually, each official custodian must publish on the website of the governmental unit, to the extent practicable, a report on the PIA requests received during the preceding calendar year. The report must include specified information on the number of PIA requests received, outcomes of PIA requests, fees and fee waivers, and efforts to proactively disclose information, among other things.

Public Information Act Compliance Board

Membership: Total membership of PIACB remains unchanged, but the qualifications of members is modified to require at least two (instead of one) attorneys admitted to the Maryland Bar and at least one member knowledgeable about electronic records, including electronic storage, retrieval, review, and reproduction technologies.

Duties of PIACB: The bill expands the duties and jurisdiction of PIACB to include reviewing and resolving complaints alleging that a custodian (1) unlawfully denied inspection of a public record; (2) charged an unreasonable fee of more than \$200 (lowered from \$350 under current law); (3) unreasonably failed to waive a fee; or (4) failed to respond to a request within established time limits.

In addition, the bill requires PIACB to review and issue written opinions for complaints from any custodian alleging that an applicant's request or pattern of requests is frivolous, vexatious, or in bad faith and makes conforming changes. Such complaints must be resolved in accordance with existing provisions governing decisions of PIACB, as amended by the bill.

If PIACB finds that an applicant's request is frivolous, vexatious, or in bad faith based on the totality of the circumstances, including (1) the number and scope of the applicant's past requests and (2) the custodian's responses to past requests and efforts to cooperate with the

applicant, PIACB must issue an order authorizing the custodian to ignore the request or respond to a less burdensome request within a reasonable time frame as determined by PIACB. PIACB must adopt regulations to carry out PIA.

Filing of Complaints: The bill modifies provisions pertaining to the filing of written complaints with PIACB. 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 Ombudsman and (2) the Ombudsman has issued a final determination stating that the dispute was not resolved. The bill specifies that a complaint must include, in addition to a copy of the original request for public records, the custodian's response to the request, if any. A complaint must be filed within 45 days after the complainant receives the final determination of the ombudsman.

Responses: The timeframe within which the subject of a complaint must file a written response to the complaint is expanded from 15 days to 30 days. Under the bill, this timeframe applies to a custodian or an applicant identified in the complaint.

On request of PIACB, a custodian or applicant must provide specified information and/or an affidavit containing a statement of facts that are at issue in the complaint. PIACB must maintain the confidentiality of any record or confidential information submitted by a custodian or an applicant that is not a public record.

The bill shortens the period of time – from 45 days to 30 days after a request is sent – after which PIACB must decide the case on the facts before PIACB if no response or other requested information is received. PIACB is authorized to order a custodian to provide appropriate remedies if the board finds that a custodian acted in violation of PIA.

Decisions: The bill expands the timeframe – from 90 days to 120 days after the filing of a complaint – within which PIACB must issue an opinion if it is unable to do so within otherwise prescribed time limits.

Office of the Public Access Ombudsman

Final Determinations and Referrals to PIACB: Within 90 days after receiving a request for dispute resolution, unless the parties mutually agree to extend the deadline, the Ombudsman must issue a final determination stating that the dispute has or has not been resolved. For a dispute that has not been resolved, the Ombudsman must inform the applicant and custodian of the availability of review by PIACB. The bill specifies that the Ombudsman may transfer basic information about a dispute, including the identity of the applicant and custodian and the nature of the dispute, to PIACB if appropriate steps have been taken to protect the confidentiality of communications made or received in the course of attempting to resolve the dispute.

Annual Report: By October 1 each year, the Ombudsman must submit a report to the Governor and the General Assembly that (1) describes the activities of the Ombudsman; (2) states the number and nature of requests for dispute resolution; (3) describes the aggregate outcomes of dispute resolutions; (4) highlights any areas of concern and recommends best practices for governmental units in responding to PIA requests; and (5) recommends any improvements to PIA.

Staffing

OAG must provide at least four staff members to assist PIACB and the Ombudsman in carrying out their duties. OAG must allocate any additional staff members as required under the bill by July 1, 2021.

Prohibited Acts

The bill prohibits a custodian from failing to respond to a request for inspection of a public record within existing time limits unless the custodian has requested an extension or dispute resolution. A custodian who violates this provision may not charge a fee for responding to the request.

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. OAG must post all such contact information on its website and in any *Public Information Act Manual* published by OAG.

Office of the Public Access Ombudsman

Chapters 135 and 136 of 2015 established the Office of the Public Access Ombudsman. The office reviews and resolves disputes between applicants and custodians over requests for public records, including disputes over:

- a custodian's application of an exemption;
- redactions of information in a public record;
- the failure of a custodian to produce a public record in a timely manner or disclose all records relevant to a request;
- overly broad requests for public records;

- a request for or denial of a fee waiver; and
- repetitive or redundant requests from an applicant.

When resolving disputes, the Ombudsman may not (1) compel a custodian to disclose public records or redacted information or (2) disclose information received from an applicant or custodian without written consent, except to the assistant Attorney General assigned to the office.

OAG is responsible for providing staff and office space for the Ombudsman while taking appropriate steps to protect the autonomy and independence of the Ombudsman.

Public Information Act Compliance Board

Chapters 135 and 136 also established PIACB, a five-member board appointed by the Governor that receives, reviews, and resolves complaints from applicants alleging that a custodian of a public record charged an unreasonable fee of more than \$350. For a complaint filed with PIACB, 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. OAG is responsible for providing staff and office space for PIACB.

Filing of Complaints: A complaint filed with PIACB must (1) identify the custodian that is the subject of the complaint; (2) describe the action of the custodian, the date of the action, and the circumstances of the action; (3) be signed by the complainant; (4) if available, include a copy of the original request for public records; and (5) be filed within 90 days after the action occurred.

Responses: On receipt of a written complaint, PIACB must send the complaint to the custodian identified in the complaint and request a response to the complaint be sent to the board. The custodian must file the response within 15 days of receiving the complaint and, on request of PIACB, include the basis for the fee charged. If a written response is not received within 45 days after the notice is sent, the board must decide the case on the facts before the board.

Decisions: If the information in the complaint and response is sufficient for making a determination, as specified, PIACB must issue a written opinion within 30 days of receiving the response. If PIACB is unable to reach a determination based on the written submissions, PIACB may schedule an information conference to hear from the complainant, custodian, or any other person with relevant information and must issue a written opinion within 30 days after the conference.

However, if PIACB is unable to issue an opinion within the timelines described above, PIACB must (1) state in writing the reason for its inability to issue an opinion and (2) issue an opinion as soon as possible, but no later than 90 days after the complaint is filed. An opinion of PIACB may state that the board is unable to resolve the complaint.

Judicial Review: A complainant or custodian may appeal a decision of PIACB to the circuit court. An appeal automatically stays the board's decision pending the circuit court's decision or for up to 30 days after the defendant serves an answer or otherwise pleads to the complaint, whichever is sooner.

Compliance Studies, Recommendations, and Annual Report: PIACB is charged with studying ongoing compliance with PIA and making recommendations to the General Assembly for improvements to PIA. By October 1 annually, PIACB must submit a report to the Governor and the General Assembly that includes a description of the activities and opinions of the board, the number and nature of complaints filed with the board, and any recommendations.

Prohibited Acts

A person may not (1) willfully or knowingly violate any provision of PIA; (2) fail to petition a court after temporarily denying inspection of a public record; or (3) by false pretenses, bribery, or theft, gain access to or obtain a copy of a personal record if disclosure is prohibited under PIA. A violation is a misdemeanor subject to a maximum fine of \$1,000.

Background: The 2019 *Joint Chairmen's Report* directed OAG to prepare a report providing information on the volume of the State's PIA requests. The [report](#), dated December 2019, revealed that a significant number of PIA disputes cannot be resolved by the Ombudsman alone and PIACB is underutilized as a result of its limited jurisdiction. According to the report, fee matters eligible for PIACB review represent a small fraction of PIA disputes; from early 2016 through September 2019, PIACB issued 22 opinions while the Ombudsman closed 800 cases. The report included several recommendations, including expanding the board's jurisdiction to review and decide all PIA disputes and requiring parties seeking board review to first attempt resolution through the ombudsman.

The report also revealed inconsistent tracking and reporting of PIA data among State agencies and recommended that the General Assembly (1) specify the data that agencies must track and report and (2) require agencies to periodically publish this data on their websites to the extent feasible.

State Revenues: The bill prohibits a custodian from charging a fee if the custodian failed to respond to a PIA request within existing time limits, as specified. To the extent that

State agencies fail to respond to PIA requests within specified time limits, PIA fee revenues may decrease minimally. However, any such impact is not expected to materially affect State revenues. The December 2019 report revealed that, in most cases, PIA requests are handled without fees being assessed.

The application of the existing criminal penalty (that applies to willfully or knowingly violating PIA) to the bill's provisions is also not anticipated to materially affect State revenues.

State Expenditures:

Office of the Attorney General: PIACB and the Ombudsman are currently supported by two full-time staff (excluding the Ombudsman): an assistant attorney general and an administrator. The bill expands the duties of PIACB and requires OAG to provide at least four staff members to support the activities of PIACB and the Ombudsman. Consistent with the December 2019 report, the Department of Legislative Services (DLS) advises that the bill's changes to the PIA dispute resolution process require the addition of two regular, full-time staff, including an assistant attorney general and an administrative officer.

Accordingly, general fund expenditures increase by \$148,053 in fiscal 2021, which accounts for a 90-day start-up delay from the bill's July 1, 2020 effective date. DLS notes that, although the bill does not require the additional staff to be in place until July 1, 2021, the additional workload anticipated for PIACB under the bill warrant that the staff be in place sooner than that. This estimate reflects the cost of hiring one full-time assistant attorney general and one full-time administrative assistant to support the activities of PIACB and the Ombudsman. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	2
Salaries and Fringe Benefits	\$137,302
Operating Expenses	<u>10,733</u>
Total FY 2021 OAG Expenditures	\$148,035

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

To the extent that additional staff are required to support the activities of PIACB and the Ombudsman, general fund expenditures increase further.

Other State Agencies: The bill requires official custodians to adopt a specified proactive disclosure policy and annually report specified PIA data. While the bill's requirements likely affect PIA-related activities across State agencies, it is assumed that agencies can

meet these requirements with existing resources, especially since the bill specifies that the proactive disclosure policy can reflect the staff and budgetary resources of an agency. According to the December 2019 report, many State agencies surveyed by OAG responded that it is feasible to periodically report PIA caseload data, and some already track such data. To the extent that State agencies do not currently track data on PIA requests, additional resources may be required. However, it is assumed, for purposes of this fiscal and policy note, that any such impact is likely minimal and absorbable within existing budgeted resources.

Local Revenues: To the extent that local governments fail to respond to PIA requests within specified time limits, local revenues may decrease minimally. However, any such impact is not expected to materially affect local revenues.

Local Expenditures: The bill's proactive disclosure policy and reporting requirements likely affect PIA-related activities for local governments. Any such impact, however, is likely to be absorbable within existing budgeted resources. To the extent that local governments do not currently track data on PIA requests, additional resources may be required.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 502 (Delegate Lierman, *et al.*) - Health and Government Operations.

Information Source(s): Office of the Attorney General; Comptroller's Office; Judiciary (Administrative Office of the Courts); Maryland State Department of Education; University System of Maryland; Department of Budget and Management; Maryland Department of the Environment; Department of General Services; Maryland Department of Health; Maryland Department of Labor; Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Transportation; State Department of Assessments and Taxation; Anne Arundel, Howard, and Montgomery counties; City of Hagerstown; Maryland Municipal League; Department of Legislative Services

Fiscal Note History: First Reader - February 10, 2020
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