

Department of Legislative Services
 Maryland General Assembly
 2021 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 120 (Delegates Acevero and Barron)
 Judiciary

Public Information Act – Personnel Records – Investigations of Law
 Enforcement Officers (Anton’s Law)

This bill establishes that a record relating to an administrative or criminal investigation of misconduct by a law enforcement officer, including an internal affairs investigatory record, a hearing record, and records relating to a disciplinary decision, is not a personnel record for purposes of Maryland’s Public Information Act (PIA). Thus, such records are not subject to mandatory denial of inspection under PIA; instead, they are subject to discretionary denial as provided under PIA. However, a custodian may deny inspection by a person in interest only under specified conditions that, under current law, apply to the denial of various investigatory records. The bill must be construed to apply prospectively to any PIA request made on or after the bill’s October 1, 2021 effective date, regardless of when the requested record was created.

Fiscal Summary

State Effect: General fund expenditures increase by \$59,000 in FY 2022; future year expenditures reflect annualization. State revenues increase to the extent State agencies seek to recuperate costs through fees.

| (in dollars) | FY 2022 | FY 2023 | FY 2024 | FY 2025 | FY 2026 |
|----------------|------------|------------|------------|------------|------------|
| GF Revenue | - | - | - | - | - |
| GF Expenditure | \$59,000 | \$68,700 | \$70,800 | \$73,300 | \$76,000 |
| Net Effect | (\$59,000) | (\$68,700) | (\$70,800) | (\$73,300) | (\$76,000) |

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

Local Effect: It is assumed that local governments can handle the bill’s changes with existing resources, as discussed below. Local revenues increase to the extent local governments seek to recuperate costs through fees.

Small Business Effect: None.

Analysis

Current Law:

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 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.

In general, 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 specifies various types of personal and confidential records of which a custodian *must* deny inspection unless otherwise provided by law, such as personnel records.

A custodian must deny inspection of a personnel record, including an application, a performance rating, or scholastic achievement information. However, a custodian must allow inspection by the person in interest, an elected or appointed official who supervises the work of the individual, or a specified employee organization, subject to limitations.

Discretionary Denials

Unless otherwise provided by law, if a custodian believes that inspection of a part of a public record would be contrary to the public interest, the custodian *may* deny inspection of that part of the record as provided under PIA. PIA specifies the types of records that are eligible for discretionary denial.

Records Pertaining to Investigations, Intelligence Information, or Security Procedures

A custodian may, subject to specified conditions, deny inspection of:

- records of investigations conducted by the Attorney General, a State's Attorney, a municipal or county attorney, a police department, or a sheriff;
- an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose; or

- records that contain intelligence information or security procedures of the Attorney General, a State’s Attorney, a municipal or county attorney, a police department, a State or local correctional facility, or a sheriff.

A custodian may deny inspection of such records by a person in interest only to the extent that the inspection would (1) interfere with a valid and proper law enforcement proceeding; (2) deprive another person of a right to a fair trial or an impartial adjudication; (3) constitute an unwarranted invasion of personal privacy; (4) disclose the identity of a confidential source; (5) disclose an investigative technique or procedure; (6) prejudice an investigation; or (7) endanger the life or physical safety of an individual. Under the bill, these conditions apply to the denial of inspection by a person in interest of a record relating to an administrative or criminal investigation of misconduct by a law enforcement officer.

“Person in interest,” as it applies to PIA, means (1) a person or governmental unit that is the subject of a public record or a designee of the person or governmental unit; (2) if the person has a legal disability, the parent or legal representative of the person; or (3) as to requests for correction of certificates of death under State law, the spouse, adult child, parent, adult sibling, grandparent, or guardian of the person of the deceased, 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.

Denial of Personnel Records Relating to Police Disciplinary Actions

In *Maryland Department of State Police v. Teleta S. Dashiell*, 443 Md. 435, 117 A.3d 1 (2015), the Court of Appeals held that the internal affairs records of an investigation into the conduct of a State police officer were “personnel records” exempt from mandatory disclosure under PIA, despite the fact that the respondent – who had filed a complaint against the officer – had identified the officer in a public forum and that her complaint against him was sustained. In addition, the court held that the respondent, as the complainant, was not a person in interest with respect to the requested records.

State Revenues: State revenues increase to the extent that State law enforcement agencies such as the Department of State Police (DSP) seek to recuperate any costs related to responding to PIA requests under the bill through fees charged in accordance with PIA. Any such impact, however, cannot be reliably estimated.

State Expenditures: DSP anticipates that it will receive additional PIA requests and spend additional time reviewing and responding to PIA requests as a result of the bill. The department advises that it is unable to absorb any increase in its PIA workload without additional support personnel. According to DSP, in calendar 2020, the department processed 3,830 PIA requests, an increase of more than 1,000 requests from the previous year. DSP further advises that the department does not currently have a full-time PIA coordinator and is not currently meeting statutory timelines for responding to PIA requests given the high request volumes.

Thus, general fund expenditures for DSP increase by \$59,036 in fiscal 2022, which accounts for the bill’s October 1, 2021 effective date. This estimate reflects the cost of hiring one additional full-time administrative specialist to assist the department in retrieving, reviewing, redacting, and copying requested records. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

| | |
|---|-----------------|
| Position | 1 |
| Salary and Fringe Benefits | \$53,455 |
| Operating Expenses | 5,581 |
| Total FY 2022 State Expenditures | \$59,036 |

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

To the extent that DSP experiences a significant increase in its PIA workload as a result of the bill, additional personnel may be needed. Other State agencies, however, can likely meet the bill’s requirements with existing budgeted resources.

Local Fiscal Effect: Local revenues increase to the extent that local governments seek to recuperate any costs related to responding to PIA requests under the bill through fees charged in accordance with PIA. In the event that the bill results in a significant increase in the PIA workload of local law enforcement agencies, local expenditures may increase for some jurisdictions to hire staff to process the requests. However, it is assumed, for purposes of this fiscal and policy note, that local law enforcement agencies can handle any impact on PIA workloads with existing resources.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 178 (Senator Carter) - Judicial Proceedings.

Information Source(s): Office of the Attorney General; Judiciary (Administrative Office of the Courts); Maryland State's Attorneys' Association; University System of Maryland; Morgan State University; St. Mary's College of Maryland; Department of Natural Resources; Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Transportation; Carroll, Cecil, Harford, Montgomery, Prince George's, and St. Mary's counties; Baltimore City; City of Salisbury; towns of Bel Air and Leonardtown; Department of Legislative Services

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Analysis by: Elizabeth J. Allison

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