HB 183

Department of Legislative Services

Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 183 (Delegate Lierman)
Health and Government Operations Education, Health, and Environmental Affairs

Public Information Act – Revisions (Equitable Access to Records Act)

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; (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 additional revisions to PIA. The bill may not be applied or interpreted to have any effect on or application to any exceptions to disclosure requirements under PIA. **The bill takes effect July 1, 2022.**

Fiscal Summary

State Effect: The operations and activities of PIACB and the Office of the Public Access Ombudsman are significantly affected beginning in FY 2023. General fund expenditures may increase by as much as $200,400 in FY 2023, increasing to as much as $201,300 by FY 2027, as discussed below. Revenues are not materially affected.

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

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, to the extent practicable, or publication of prior responses to PIA requests.

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 receiving, reviewing, and resolving complaints alleging that a custodian unlawfully denied inspection of a public record or failed to respond to a request within established time limits.

In addition, the bill requires PIACB to receive, review, and issue written decisions 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 timeframe as determined by PIACB. PIACB must adopt regulations to carry out the board's duties.

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 Office of the Public Access 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 30 calendar 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 calendar days. Under the bill, this timeframe applies to a custodian or an applicant identified in the complaint, depending on which party files the complaint.

On request of PIACB, a custodian or applicant must provide specified information and/or an affidavit or a statement containing the facts that are at issue in the complaint. If the complaint alleges that a custodian denied inspection of a public record, the custodian may not be required to produce the public record for the board; however, the board may request information about the public record from the custodian. PIACB must maintain the confidentiality of any record or confidential information submitted by a custodian or an applicant that is not a public record. A custodian may not be civilly or criminally liable under Maryland law for providing or describing a public record to PIACB, and the provision or description of a record to PIACB may not be construed as a waiver of any applicable privilege. Additionally, the bill modifies the definition of "public record," as it applies to PIA, to exclude a record or any information submitted to the ombudsman or PIACB.

The board must issue a written decision within 30 calendar days after receiving the written response and requested information. The bill shortens the period of time – from 45 days to 30 calendar days after a request is sent – after which PIACB must decide the case on the facts before it 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. The bill further clarifies that the board must issue a written decision within 30 *calendar* days after any informal conference scheduled by the board to hear from the complainant, custodian, or applicant.

Decisions: The bill expands the timeframe – from 90 days to 120 days after the filing of a complaint – within which PIACB must issue a decision if it is unable to do so within otherwise prescribed time limits. A person may not appeal to the circuit court a decision of PIACB stating that the board is unable to resolve the complaint.

Office of the Public Access Ombudsman

Duties of the Ombudsman: The bill expands the duties of the ombudsman to include resolving disputes relating to fees and requests or patterns of requests that are alleged to be frivolous, vexatious, or made in bad faith.

Final Determinations and Referrals to PIACB: Within 90 calendar 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.

Permitted Disclosures: The bill authorizes the ombudsman to disclose information received from an applicant or custodian to any person working under the direction of the ombudsman. An individual to whom the ombudsman discloses information may not disclose the information without written consent from the applicant and custodian. The bill further 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.

Staffing: OAG must provide at least two 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, 2022.

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.

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 informal 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.

State Expenditures:

Office of the Attorney General: The bill requires OAG to provide at least two staff members to support the activities of PIACB and the ombudsman. PIACB and the ombudsman share staff and are currently supported by two full-time staff (excluding the ombudsman): an assistant Attorney General and an administrator. Thus, the bill's minimum staffing requirement does not directly affect State expenditures, as it codifies current staff levels.

However, the bill expands the duties and jurisdiction of PIACB with respect to reviewing and resolving PIA disputes. Based on data and analysis contained in a December 2019 report issued by PIACB and the Office of the Public Access Ombudsman in response to the 2019 *Joint Chairmen's Report*, it is assumed that the board's caseload will increase significantly as a result of bill's expansion of the board's jurisdiction. Among other things, the report recommended an integrated PIA dispute resolution process similar to the one contemplated under the bill. The 2019 report further advised that the recommendation could be implemented with two additional full-time staff, including an assistant Attorney General and an administrative officer.

Consistent with the staffing recommendations contained in the 2019 report, the ombudsman had previously advised the Department of Legislative Services (DLS) – with respect to similar, prior legislation and an earlier version of this bill – that additional

full-time staff would be needed due to projected increases in the board's caseload. However, the ombudsman and the board now advise that this bill's requirements can likely be handled with existing resources.

In response to follow-up questions from DLS, the ombudsman and the board advise that, given the board's low caseload, staff currently assigned to the two programs are not fully subscribed by their duties with respect to the board and ombudsman programs and devote part of their time supporting other OAG offices and programs. Further, the ombudsman advises that various discretionary activities, such as (1) responding to "help desk" matters, or requests for assistance relating to PIA matters that do not involve mediation or actual disputes, and (2) conducting trainings across the State upon requests from agencies and organizations, take up a substantial amount of staff time. Thus, according to the ombudsman and the board, the bill's requirements can likely be met without additional staff, assuming that (1) staff currently assigned to the ombudsman and the board may be devoted to the two programs full-time and (2) various operational changes are implemented to reduce staff time spent on discretionary activities (such as training and outreach activities and responding to help desk matters). They further advise that the bill's delayed effective date gives them time to implement the necessary administrative changes.

However, PIACB and the ombudsman also advise that it is uncertain whether actual caseloads under the bill will necessitate additional staff support. Moreover, OAG anticipates that it would likely need to hire at least one additional assistant Attorney General and one part-time administrative support staff in order to provide adequate support to the ombudsman and the board under the bill. Accordingly, it is unclear if the bill can, indeed, be implemented with existing staff.

Given the uncertainty that exists, DLS is unable to independently verify the staffing needs of the board and the ombudsman. It is assumed that, at minimum, the operations and activities of the board and ombudsman programs are significantly affected, as resources are reallocated from various discretionary activities to support the anticipated increase in the board's caseload. To the extent that contemplated operational changes do not sufficiently free up resources to assist the board in managing its expanded duties under the bill, additional staff are likely needed. Further, to the extent that staff assigned to the ombudsman and the board must be dedicated to these programs full-time, and are no longer able to provide support to other OAG offices and programs, OAG may require additional staff in order to backfill other responsibilities. In the event that additional staff is needed as a result of the bill, general fund expenditures for OAG increase beginning as early as fiscal 2023 due to the bill's July 1, 2022 effective date. *For informational purposes*, to hire two additional full-time staff (an assistant Attorney General and an administrative staff person) beginning in fiscal 2023, costs total approximately $200,400 in fiscal 2023, increasing to approximately $201,300 by fiscal 2027.

Other State Agencies: The bill requires official custodians to adopt a specified proactive disclosure policy. It is assumed that agencies can meet this requirement with existing resources, as the bill specifies that the proactive disclosure policy may reflect the staff and budgetary resources of an agency. While the bill may otherwise generally affect PIA-related activities across State agencies, any such impact is not expected to affect State finances.

Local Expenditures: It is assumed that local governments can adopt a proactive disclosure policy as required under the bill with existing budgeted resources. The bill is not otherwise expected to materially affect local government finances.

Additional Information

Prior Introductions: HB 502 of 2020, a similar bill, received a hearing in the House Health and Government Operations Committee, but no further action was taken. Its cross file, SB 590, received a hearing in the Senate Education, Health, and Environmental Affairs Committee, but no further action was taken.

Designated Cross File: SB 449 (Senator Kagan) - Education, Health, and Environmental Affairs.

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; Morgan State University; Maryland Department of Agriculture; Department of Budget and Management; Maryland Department of Health; Department of Human Services; Department of Juvenile Services; Department of Natural Resources; Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Transportation; State Ethics Commission; Maryland Insurance Administration; Public Service Commission; Department of Information Technology; Baltimore City; Caroline, Howard, Montgomery, and Prince George's counties; cities of Annapolis and Bowie; Department of Legislative Services

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