BRIAN E. FROSH
*Attorney General*

ELIZABETH HARRIS
*Chief Deputy Attorney General*

CAROLYN QUATTROCKI
*Deputy Attorney General*

# STATE OF MARYLAND
# OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.

WRITER'S DIRECT DIAL NO.
410-576-6584

February 13, 2020

To: The Honorable Paul G. Pinsky
Chair, Education, Health, and Environmental Affairs Committee

From: Hannibal G. Williams II Kemerer, Legislative Director, Office of the Attorney General

Re: SB 590 Public Information Act – Revisions (LETTER OF INFORMATION)

Although the Office of the Attorney General does not have a position on Senate Bill 590 at this stage, the Office submits this letter to provide information regarding operational matters for the Committee's consideration.

As an initial matter, the bill requires the Office of the Attorney General to provide two additional staff members (either attorneys or other staff) to support the Public Access Ombudsman and the PIA Compliance Board. However, the bill neither guarantees funding for those two positions nor makes that staffing requirement subject to the appropriation of funds in the budget. As the Ombudsman and PIA Compliance Board explained in their recent report, the PIA Compliance Board will depend heavily on its support staff to help handle its expanded caseload if, as the bill contemplates, the Compliance Board is to continue to be composed of purely volunteer members. *See* Final Report on the Public Information Act, at 37 (Dec. 27, 2019) ("PIA Final Report"); *see also* Maryland Office of the Attorney General, Final Report on the Implementation of the Public Information Act at 15 (Dec. 2017) (explaining that assigning to the Compliance Board the power to adjudicate most or all PIA disputes may "place unreasonable expectations on the Board and its staff," at least without providing the Board with significant additional staff support). Thus, for the Compliance Board to succeed in its mission, it is critical that the bill be accompanied by sufficient funding to hire the necessary attorneys and support staff.

In determining the level of staff support needed for the proposed program to succeed, it is difficult to predict exactly how much the Compliance Board's caseload will increase as a result of the expanded jurisdiction provided for in SB 590. The recent report by the Ombudsman and Compliance Board estimates that, under SB 590, the Compliance Board will have a caseload of approximately 61 cases per year (significantly more than the 14 complaints received in fiscal year 2019) and that 2 new staff members could handle this increased caseload. That estimate, however, is based on the assumption that the Ombudsman's caseload will remain more or less the same after the changes in SB 590 are enacted, *see* PIA Final Report at 14, an assumption that might not be accurate. As the recent report points out, one of the common concerns that PIA requesters currently have about the Ombudsman's dispute resolution process is that the Ombudsman is unable to provide for any binding administrative relief. *See* PIA Final Report at 18. As a result, some requesters who do not think mediation would be helpful in their case choose not to utilize the Ombudsman at all. But if the Ombudsman becomes the first step in a process by which those requesters can obtain binding administrative relief from the Compliance Board, it is likely that more requesters will seek mediation than before. And if the Ombudsman's caseload increases, then the Compliance Board's caseload is, in turn, likely to increase even more than the substantial increase that has already been anticipated. Moreover, the bill establishes tight timelines for the Ombudsman and the Compliance Board to resolve the matters before them, which means that adequate staff support will be especially important to prevent a backlog or delays in the process.

For those reasons, the Office of the Attorney General believes that 3 new positions, not just 2, would be the minimum to adequately staff the Ombudsman and Compliance Board under the proposed changes in SB 590. Further, the Office has concerns with the conclusion in the current Fiscal Note that only one additional attorney would be needed. That conclusion may not have taken into account the level of support that will be needed for the Compliance Board's timely resolution of the many legal issues that will come before it with expanded jurisdiction, such as evaluating exceptions to disclosure. Moreover, the recommendation of the Ombudsman and Compliance Board was to leave the Office with the flexibility to hire two attorneys, rather than one attorney and an administrative staff, if necessary. In our view, it is important that, at the very least, the Office be given that flexibility.

In addition, there are a few other operational aspects of the bill that the General Assembly may wish to clarify:

- Although the bill provides that a complainant must file a complaint with the PIA Compliance Board within 45 days after a final determination by the Ombudsman that the dispute was not resolved, the bill does not include any deadline by which a party must submit a request for dispute resolution with the Ombudsman. As such, the bill could be read to allow a PIA requester or a custodian to delay seeking assistance from the Ombudsman for an extended period of time and yet still take any dispute that the

Ombudsman cannot resolve to the Compliance Board. That would stand in stark contrast to the process as it currently exists, which provides that a complainant must seek administrative review from the Compliance Board within "90 days after the action that is the subject of the complaint occurred." Md. Code Ann., Gen. Prov. § 4-1A-05(b)(5).

- The bill is not clear about whether the new Compliance Board jurisdiction will apply to matters that are pending before the Ombudsman at the time the bill goes into effect or to PIA requests that were already submitted and responded to before the bill's effective date. The General Assembly may wish to clarify the extent to which the bill is intended to apply retroactively.
- In some cases, the categories for reporting in proposed § 4-105 may be confusing and could lead to inconsistent reporting. For example, for the number of requests granted or denied within 10 business days, a custodian will often grant or deny part of the request within 10 business days and the rest of the request within 30 days. But it is not clear how such a matter should be reported under the language of the bill. Also, requiring custodians to generate reports on both the total number of requests granted in part and the total number of requests for which redacted records were provided could lead to confusion and inconsistent reporting, because requests where redacted records are provided are, by definition, requests that are granted in part.
- There is some ambiguity in the provisions governing the deadlines for submitting responses to the PIA Compliance Board. For example, under proposed § 4-1A-06(b)(1), a response is due within 30 days after the respondent *receives* the complaint. However, under proposed § 4-1A-06(c), if a written response is not provided within 30 days after a request for further information is *sent*, rather than received, the Board "shall decide the case on the facts before the Board."
- In proposed § 4-1A-06(b)(2)(i), it is not clear how that provision (which allows the Compliance Board to request a response to a request for a public record) relates to the earlier provision (§ 4-1A-04(a)(3)(iv)), which already allows the Board, if it finds that a custodian failed to comply with the timelines, to order the custodian to promptly respond.
- Under proposed § 4-1A-06(b)(4), it is not clear what the bill means when it provides for the confidentiality of "any record or confidential information submitted by a custodian or an applicant under this subsection that is not a public record." We assume that the provision is intended to provide for confidentiality of documents that are reviewed by the Compliance Board for the purposes of an in camera review, but the language leaves some ambiguity.
- Regarding proposed § 4-402(b), which generally prohibits a custodian from charging a fee if the custodian did not provide a response within the act's time limits, it is unclear

whether those time limits include the 10-day deadline for providing a preliminary response or only the 30-day deadline for providing a final response.

In closing, the Office of the Attorney General shares the overall goal of improving compliance with the Public Information Act. As part of achieving that goal, the Office thinks that it is important to focus also on ways in which to assist custodians to locate, review, and produce documents both in a timely way and in compliance with their statutory duties. As noted in our Office's Interim Report on the Implementation of the Public Information Act at 34 (Dec. 2016), depending on the size and complexity of the request, the production of documents under the PIA can often be difficult and time-consuming. Thus, the General Assembly may wish to consider that, for many custodians, there is a need for additional resources, staff, and records management software devoted specifically to the PIA.

cc: Members of the Education, Health, and Environmental Affairs Committee