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To: The Honorable Shane Pendergrass
Chair, Health and Government Operations Committee

From: Office of the Attorney General

Re: HB 183 Public Information Act – Revisions (Equitable Access to Records Act) (LETTER OF INFORMATION)

The Office of the Attorney General (the "Office") is committed to the principles of open access to information and to promoting a consistent application of the Act throughout State and local government. Indeed, the Office has long played a special role under the Public Information Act ("PIA") and has long worked toward ensuring the correct implementation of the Act through, among other things, publication of its Public Information Act Manual. Although the Office does not have a position on House Bill 183 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 to provide two additional staff members (on top of the two staff that the Office already provides) to support the Public Access Ombudsman and the PIA Compliance Board. However, the bill neither guarantees funding for those two new positions nor makes that requirement subject to the appropriation of funds in the budget for the positions. As the Ombudsman and PIA Compliance Board explained in their 2019 report, the Compliance Board will depend heavily on its counsel and support staff to help handle its expanded caseload given that 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"). The complexity of the matters decided by the Compliance Board will also increase dramatically. 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. Particularly during this time of fiscal uncertainty, the Office needs assurances that it will be provided the funding for the personnel necessary to support the Ombudsman and Compliance Board.

The Office also believes that the bill may be underestimating how much the Compliance Board's caseload will increase and, as a result, the attorney and staff support that the Attorney General will have to provide. The 2019 report by the Ombudsman and Compliance Board on which this bill is based estimated that the Compliance Board's caseload would grow to

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 this bill are enacted, *see* PIA Final Report at 14, an assumption that is questionable. Although it is difficult to predict precisely how much the Board's caseload will increase, one of the common concerns that PIA requesters currently have about the Ombudsman's process is that she 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 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. For those reasons, this Office believes that *three* new positions (for a total of 5 positions) would be the minimum to adequately staff the Ombudsman and Compliance Board under the proposed changes in this bill.

The total cost of providing three new positions to support the Ombudsman and Compliance Board—that is, two new lawyers and one new administrative staff person—would likely be $290,000, the first year. And if the Office of the Attorney General is not provided with an adequate level of funding for that expanded role, we may need to transfer resources from other units of the Office (e.g., the Consumer Protection Division, the Antitrust Division, etc.) that are already understaffed themselves.

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 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 stands 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 adds to the definition of "public record" that a "public record" does not include "a record or any information submitted to the [PIA Compliance] Board under Subtitle 1A of this Title." Although it appears that the purpose of this change is to protect the confidentiality of any documents that might be submitted to the Compliance Board for *in camera* review, the language may be broader than intended, as it would seem to mean that even the complaint and response (and other similar non-sensitive materials) submitted to the Compliance Board are not subject to the PIA.

- 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 report 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.

In closing, the Office of the Attorney General shares the goal of improving compliance with the Public Information Act. We hope that the Committee will consider our thoughts on these operational matters, and we are happy to work with you on amendments.

cc: Members of the Health and Government Operations Committee