



**MSBA Main Office**  
520 West Fayette Street  
Baltimore, MD 21201  
410-685-7878 | [msba.org](http://msba.org)

**Annapolis Office**  
200 Duke of Gloucester Street  
Annapolis, MD 21401  
410-269-6464 | [msba.org](http://msba.org)

February 9, 2024

The Honorable Delegate Joseline A. Pena-Melnyk  
Chair, House of Delegates Health and Government Operations Committee  
241 Taylor House Office Building  
6 Bladen Street  
Annapolis, MD 21401

**Re: MSBA Business Law Section**

Testimony in **Opposition** of House Bill 712 (Public Information Act – Denials – Confidential Information)

Dear Chair Pena-Melnyk and Fellow Committee Members:

The Business Law Section Council (the “Section Council”) of the Maryland State Bar Association (the “MSBA”) annually reviews proposed legislation that may affect Maryland businesses. We are submitting this written testimony concerning House Bill 712 (the “Bill” or “HB 712”). In general, the Bill would amend Section 4, Title 3, subtitle 5 of the General Provisions of the Maryland Code within the Maryland Public Information Act (the “PIA”) to lessen the protections against disclosure of sensitive information obtained by the State of Maryland from private businesses.<sup>1</sup> In particular, the Bill would lessen protection from disclosure of trade secrets, confidential commercial or financial information, and confidential geological or geophysical information (collectively, “Confidential Information”). Currently, Confidential Information is entirely exempt from disclosure under the PIA. As amended by the Bill, the PIA would exempt Confidential Information from such disclosure only if “disclosure of the information is likely to result in substantial competitive harm to persons from which the information was obtained.”

**The Section Council opposes the Bill.** The Business Law Section supports the principle underlying the PIA that public knowledge of government activities is critical to the functioning of a democratic society. Equally important, the Section Council supports the provisions in the PIA that balance the public’s right to access government records with the privacy and confidentiality concerns of businesses and individuals who are required to and often voluntarily provide information to the State. As currently drafted and interpreted by the Maryland judiciary, the PIA largely strikes the proper balance between these competing principles. The Bill would upend this balance and result in the exposure of sensitive business information to competitors, the media, and others by requiring that State custodians produce Confidential Information to a requesting party unless the State custodians independently determine that the release of the information likely would cause substantial competitive harm to the person from which it was obtained. This would dramatically alter the balance struck by the PIA as well as by the federal Freedom of Information Act (“FOIA”) after which the PIA was modeled by more

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<sup>1</sup> GP §4-355 applies to individuals as well as businesses. This testimony focuses on the impact of the Bill on businesses, but the Section Council believes that the Bill would negatively impact individuals providing information to the State in a similar manner as businesses.

heavily favoring public access to the detriment of privacy and confidentiality concerns. Accordingly, the Bill would dramatically harm companies organized and doing business in Maryland.

Confidential Information obtained from businesses is currently exempt from disclosure under the PIA. The only analysis necessary for State custodians who receive PIA requests for information obtained from businesses is whether the information falls within the definition of Confidential Information. The Maryland appellate courts have adopted definitions governing this analysis.

The Appellate Court of Maryland defines “trade secret” as a “secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”<sup>2</sup> The Supreme Court of Maryland defines “confidential commercial and financial information” as information that “would customarily not be released to the public by the person from whom it was obtained.”<sup>3</sup> No Maryland appellate court has had occasion to define “confidential geological or geophysical information.” It seems logical and highly likely, however, that the appellate courts would apply substantially the same definition for confidential and commercial and financial information and conclude that geological or geophysical information is “confidential” if it is of the nature that “would customarily not be released to the public by the person from whom it was obtained.”<sup>4</sup>

The Bill would lessen the protections from disclosure of Confidential Information under the PIA by superimposing an old, likely overruled, federal standard for determining under FOIA whether information *required* to be produced to the federal government (versus *voluntarily* produced) qualified as “confidential commercial and financial information.”<sup>5</sup> This would dramatically alter the current balance between public access and privacy rights in multiple ways.

First, trade secrets obtained from businesses would be available to PIA requestors unless a State custodian independently concluded that releasing such information would likely result in substantial competitive harm. This is untenable. Trade secrets are the lifeblood of practically every company doing business in Maryland. Most obviously, technology and biotech companies spend years developing products and services that would immediately lose substantially all commercial value if the companies do not take reasonable—and often extraordinary—steps to keep their trade secrets protected from disclosure. By no means, however, is this concern limited to these two industries. The Section Council posits that almost every (if not every) company in Maryland has some form of trade secret. State custodians are not capable of, and should not be burdened with, determining the level of harm that disclosure of a business’ Confidential Information to third parties might cause such business. Such a

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<sup>2</sup> *Prince George’s County v. Washington Post Co.*, 149 Md. App. 289, 312, n.17 (2003).

<sup>3</sup> *Amster v. Baker*, 453 Md. 68, 81 (2017) (quoting *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992)). The *Maryland Public Information Act Manual* published by the Office of the Maryland Attorney General (the “PIA Manual”) confirms that this is the definition for confidential information *voluntarily* provided to the State by businesses. PIA Manual at 3-25. But the PIA Manual asserts that it is unclear whether this definition equally applies to confidential information that is required to be provided to the State by businesses. *Id.* The PIA Manual instructs State custodians to apply both potential standards and communicate with agency counsel and consider the position of the producing party if there is a different conclusion when applying both definitions. *Id.* at 3-29.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

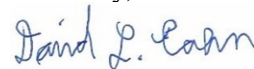
determination will generally require in-depth knowledge of the industry and the specific business in question, as well as a thorough understanding of the Confidential Information provided, which, in the case of trade secrets, may be highly technical in nature. In many, if not most, instances, the State custodians would not have the knowledge, training, or skillsets to make these determinations. Even more importantly, public availability of trade secrets under the PIA or otherwise would likely destroy their status and protection under the Maryland Uniform Trade Secrets Act.<sup>6</sup>

Second, the Bill's impact on Maryland's treatment of confidential commercial, financial, geological, and geophysical information would be result in Maryland providing less protection than under any prior PIA standard and under FOIA for all confidential information obtained from businesses. Even under the less protective former FOIA standard, the federal government gave more protection to information that businesses *voluntarily* provided to the government. Under that standard, the federal government deemed voluntarily produced commercial and financial information "confidential" and thus protected from disclosure if it was information that "would customarily not be released to the public by the person from whom it was obtained." For information that was *required* to be produced, the federal government applied the standard used by the Bill—*i.e.*, whether disclosure under FOIA would likely result in substantial competitive harm to persons from which the information was obtained.

Third, the Bill fails to address the current lack of any right of intervention under the PIA for the businesses who provide information to the State. Currently, State custodians are not required to notify businesses when PIA requestors seek information obtained from the business. This is inconsistent with at least some, if not all, federal custodians. For example, the U.S. Securities and Exchange Commission ("SEC") permits private businesses and individuals who provide information to the SEC—either voluntarily or required information—to request confidential treatment under FOIA.<sup>7</sup> The SEC has a process whereby the producing businesses and individuals can appeal adverse determinations concerning whether the produced information qualifies for exemptions from disclosure under FOIA.<sup>8</sup> Neither the PIA nor any implementing regulations have any process whereby businesses can request confidential treatment or be made aware of requests for information that potentially qualifies for protection as Confidential Information under the PIA. By contrast, any communications with businesses from whom information is obtained is purely discretionary on the part of State custodians.

Thank you for your time and consideration of our testimony opposing HB 712.

Sincerely,



David L. Cahn

Chair

Business Law Section Council

cc: Business Law Section Council  
Shaoli Katana, MSBA Director of Advocacy and Government Relations

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<sup>6</sup> Md. Code Ann., Com. Law § 11-1201(e) (2024) (defining trade secrets as, among other requirements, information that is "the subject of efforts that are reasonable under the circumstances to maintain its secrecy").

<sup>7</sup> 17 C.F.R. § 200.83 (2024).

<sup>8</sup> *Id.*