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**Testimony in Opposition to House Bill 712
Public Information Act – Denials – Confidential Information**

**House Health and Government Operations Committee
February 13, 2024
1:00 P.M.**

**Anne Gawthrop
Director of Legislative Affairs
State Retirement Agency**

The Board of Trustees for the State Retirement and Pension System (System) wishes to express its opposition to House Bill 712, Public Information Act – Denials – Confidential Information.

House Bill 712 would alter the legal test regarding when an exemption is available to protect trade secrets, confidential commercial information and confidential financial information shared by a third party with the State Retirement Agency (Agency) and other government entities subject to the Public Information Act.

The Supreme Court of Maryland has held that for financial or commercial information that is voluntarily supplied to the government, that information is confidential and thus exempt from disclosure if it "would customarily not be released to the public by the person from whom it was obtained." (*Amster v. Baker*, 453 Md. 68, 81 (2017), citing *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992)). For information that is required to be given to the government, financial or commercial information is treated as confidential if disclosure would likely (1) impair the government's ability to obtain the necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. (69 Md. Op. Atty. Gen. 231, 234 (1984), applying the standard set forth in *Nat'l. Parks & Conservation Ass'n*, 498 F.2d 765, 770 (1974)).

It seems House Bill 712 seeks to make the 2nd independent prong of the *National Parks* test applicable to all confidential commercial and financial information, regardless of whether it was voluntarily supplied or required to be given. It would eliminate the standard for voluntarily supplied information, which simply considers whether the 3rd party would customarily release that information to the public. It would also eliminate the first part of the *National Parks* exception for required information, under which information is confidential if disclosure would impair the government's ability to obtain the necessary information in the future. For additional information about the legal standard, please see the Maryland Public Information Act Manual (18th ed., Oct. 2023) published by the Office of the Attorney General, at pages 3-24 to 3-29. <https://www.marylandattorneygeneral.gov/OpenGov%20Documents/Chapter3.pdf>

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The new standard that House Bill 712 establishes for when the Agency is permitted to deny inspection of confidential commercial information shared by the investment managers of the System, would likely have a significant impact on the System's investment program. While this bill would impact investment managers working across all asset classes of the System, we believe it could have a material impact on the System's access to private investment managers.

The System's private equity asset class has been the strongest performing asset class over the past several years. In fact, the System's private equity program is one of the strongest performing among all public pension plans in the country. Because of this, the System is invited to invest with top-performing private equity managers. Additionally, the System's private equity program has allowed it to weather more turbulent periods in the equities markets without significant impact to the System's overall performance. Under the new standard for denying disclosure of confidential commercial information established in House Bill 712, these managers who are not in need of the System's capital, may choose not to partner with the System if a manager perceives an increased risk in disclosure of its confidential or proprietary information should this new standard apply.

While it is difficult to quantify the impact on investment performance due to the necessity of the use of assumptions, the direction and degree of the impact can be derived by using reasonable and conservative estimates. For venture capital since 2010, the return multiple for top quartile managers is 2.04, while the multiple for median venture managers is 1.31. Assuming a \$50 million investment, a top quartile manager would generate total proceeds of \$102 million, compared to \$65.5 million for a median manager. This performance difference equates to \$36.5 million. If this scenario is experienced each year over a ten-year period, the total impact on the System would be a loss of \$365 million in returns. Considering that the System invests over \$1 billion in private equity each year, the ultimate impact could be significantly larger than the previous example. The impact to the State when the System generates lower returns translates into higher employer contributions to the System.

We appreciate being given the opportunity to raise these issues with the Committee and stand ready to provide any further information or services the Committee might request regarding House Bill 712.