

February 13, 2024

House Health and Government Operations Committee
Chair: Delegate Joseline A. Peña-Melnyk
House Bill 712 - Public Information Act - Denials - Confidential Information

Re: Letter of Information

The Office of Financial Regulation (“OFR”) seeks to inform the Committee of its concerns with the impact that enactment of HB712 could have on the OFR’s ability to carry out its licensing and regulatory responsibilities.

This Bill changes the standards applicable to the disclosure of confidential information provided to the OFR and other custodians of government records under the Maryland Public Information Act (MPIA). In doing so, it appears to be a codification of the second part of an old analysis stated in the case of National Parks v. Morton, 498 F.2d 765, 770 (1974). In *National Parks*, the D.C. Circuit Court determined that information was confidential commercial information if disclosure would: a) impair the government’s ability to obtain the information in the future; or b) cause substantial harm to the competitive position of the entity. The *National Parks* test is an old analysis which the Supreme Court declined to apply in 2019 when it instead created a new test in the case of Food Mktg. Inst. v. Argus Leader, 139 S.Ct. 2356 (2019). Under this new test, information is deemed to be confidential commercial information if disclosure by the government would mean the loss of the information’s confidential nature without sufficient assurances of privacy from the government. While the *Argus* case involves the Supreme Court’s interpretation of the federal Freedom of Information Act (FOIA), MPIA was largely drafted around FOIA and has been interpreted along similar lines, although since the issuance of the decision in the *Argus case* the Maryland Courts have yet to weigh in on the application of the new test. OFR would like the Committee to consider the negative impact on the State of codifying a portion of judicial test that the Supreme Court has invalidated in examining similar legislation. It is an impact that could put Maryland out of step, and at a disadvantage, with other states and federal law in dealing with the disclosure of information provided to government agencies.

The *National Parks* test centers on the concept of “Substantial harm” which is a vague standard for agencies to determine. Choosing to codify only a piece of the *National Park’s* test could make confidential information vulnerable to disclosure. As a result, there is a possibility that OFR’s licensees may begin to filter information, and some may choose not to do business in Maryland in order to avoid the potential for disclosure of the confidential information that they provide to the State. Representatives of companies that utilize the Nationwide Multistate Licensing System (NMLS) (the system used by OFR for licensing of all of its non-depository licensee) have already expressed apprehension with sharing confidential information with the Conference of State Bank Supervisors (CSBS) when that information could be disclosed through public information act requests. OFR believes that enactment of HB 712 will further the concerns of such companies potentially increasing the difficulty in making licensing determinations. Additionally, other states that use the NMLS system and with whom the OFR cooperates may choose to limit the information that they share about licensees with OFR if the MD standard is lower than their disclosure standards.



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OFR collects information from many of its licensees through both the licensing and examination processes through the NMLS. NMLS is a system used by all of the states for licensing and registration purposes. During the licensing process, OFR receives information from licensees that details their business model and other potentially confidential commercial information. In order for OFR to ensure that it is making a correct determination when licensing an entity, OFR must be sure that the information it receives is complete and accurate. Instituting legislation that would create a vague standard for confidential commercial information and subjecting information an entity deems as confidential to potential public disclosure could lead applicants to filter and/or provide less than complete information. It could also impact the willingness of licensees to cooperate with OFR in responding to consumer complaints, since information they deem confidential commercial information and relevant to the issue could potentially be disclosed to the public.

The fact that the *National Park's* test has been repudiated by the Supreme Court coupled with the fact that it involves agency determination of whether disclosure will cause **substantial** harm to the competitive position of the entity are both considerations that lead the OFR to have significant concern over the impact of HB 712 on the Office's ability to carry out its licensing and regulatory responsibilities.