



HOUSE HEALTH AND GOVERNMENT OPERATIONS COMMITTEE

House Bill 712

Public Information Act - Denials - Confidential Information

February 13, 2024

Unfavorable

Chair Pena-Melnyk, Vice Chair Cullison and members of the committee, thank you for allowing the University System of Maryland (USM) the opportunity to offer testimony on House Bill 712.

The USM is comprised of twelve distinguished institutions, and three regional centers. We award eight out of every ten bachelor's degrees in the State. Each of University USM's 12 institutions has a distinct and unique approach to the mission of educating students and promoting the economic, intellectual, and cultural growth of its surrounding community. These institutions are located throughout the state, from Western Maryland to the Eastern Shore, with the flagship campus in the Washington suburbs. The USM includes three Historically Black Institutions, comprehensive institutions and research universities, and the country's largest public online institution.

HB 712 would have an unfavorable impact on the institutional members of the University System of Maryland as well as a negative impact on all of the entrepreneurial efforts and initiatives in which USM institutions have engaged over the past 10 years. Not only would there be fewer research and development partnerships, but it actually gives a competitive advantage to other research institutions with whom we regularly compete for research funding and opportunities because they are not covered by the MPIA whether within Maryland or not.

Moreover, Maryland would have weaker protections for trade secrets than the federal government. If HB 712 is enacted into law, the MPIA would weaken protections for trade secrets. By requiring Maryland universities and agencies to prove that disclosure is "likely to result in substantial competitive harm," the law would leave trade secrets vulnerable.

Fewer private companies would submit procurement bids with Maryland universities and State agencies. Maryland's procurement processes require private companies to submit confidential financial information to show their fitness for the project. To show that they are best able to perform the work, companies also regularly submit sensitive trade secrets in their bid proposals. Competitors often try to misuse the MPIA to steal trade secrets and confidential commercial information from competitors. Many small companies' primary assets are trade secrets and/or proprietary, and this MPIA tactic causes them a lot of consternation.

Below are five primary issues of concern for your consideration:

1. HB 712 would codify into the MPIA the worst part of a heavily-criticized FOIA standard that's been overruled by the United States Supreme Court.

HB 712 would amend the MPIA to require State universities and agencies to establish that disclosure of the trade secrets or confidential commercial information “is *likely to result in substantial competitive harm....*” HB 712 (emphasis added). This seems to be an attempt to revive *part* of an old federal Freedom of Information Act (FOIA) standard from *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). However, in 2019, the United States Supreme Court overruled this standard, noting that “*National Parks has drawn considerable criticism over the years....*” *Food Mktg. Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019) (emphasis added). In its place, the Supreme Court adopted a cleaner standard that is largely consistent with Maryland’s current standard in *Amster v. Baker*, 453 Md. 68, 76 (2017) (“if it would customarily not be released to the public by the person from whom it was obtained”). HB 712 would upend Maryland law, and codify into the MPIA a discredited standard.

2. HB 712 would be difficult for Maryland State agencies and courts to apply, and would result in result in costly litigation to Maryland taxpayers.

Under the old *National Parks* standard, federal agencies and courts struggled over how to determine if release of a piece of information was “likely” to cause “substantial harm to the competitive position” of a business? HB 712 would force Maryland state agencies to speculate about the competitive harms of every piece of information we release. How exactly would State agencies actually decide this nebulous standard? Moreover, the MPIA has a fee-shifting provision for plaintiffs. Md. Code, GP § 4-362(f). If HB 712 is enacted, *MPIA litigation against State agencies will increase, and taxpayers will have to pay the attorney’s fees of successful plaintiffs.*

3. HB 712 would significantly weaken protections of trade secrets owned by UMB, biotech companies, and small businesses which submit procurement bids.

HB 712 would significantly weaken the protections for trade secrets and take us below the protections under federal or existing Maryland law. Last year, approximately *23% of our MPIA requests were from business competitors or data brokers who sell proprietary information.* HB 712 would only embolden rivals and data brokers to make more MPIA requests for trade secrets, and litigate denials of their requests in court. Rivals could acquire trade secrets through the MPIA that they could not otherwise lawfully obtain. With the threat of the MPIA’s fee-shift, many state agencies would simply disclose more proprietary information of businesses.

4. HB 712 would have a chilling effect on procurement bidders and biotech research.

USM’s sponsored research partners already express great concerns about exposing their trade secrets through the MPIA. Our procurement bidders are often fearful when we receive an MPIA requests for their procurement proposals. The ambiguities of HB 712 would only heighten these concerns. HB 712 would have thus have a chilling effect. Fewer procurement bidders would submit bids, resulting in higher prices and weaker options for business services to the State. We can reasonably expect that institutions of higher education would reach fewer research and

licensing partnerships in the area of biotech. HB 712 is at odds with the State’s mandate that our universities engage in “*collaborative research and development, commercial application of institution-owned intellectual property....*” Md. Code, Educ., § 15-107 (emphasis added).

5.HB 712 would increase administrative costs to universities, MPIA litigation, and attorney’s fees for Maryland taxpayers. To evaluate the fiscal effects, consider these impacts.

First, universities would have to devote more staff resources to reviewing MPIA requests, and to justifying the withholding of any trade secrets under the high standard of HB 712. It would also substantially increase the workload for each institution's legal office, procurement office, tech transfer office, and sponsored research office, which would impact the ability of those offices to carry out their existing functions in support of institutional missions.

Second, universities would have to mediate and litigate more MPIA challenges as business competitors challenge our decisions on trade secrets administratively and in court. The PIA Ombuds and PIA Compliance Board are already inundated. Passage of this bill would only further clog the pipeline.

Third, with this nebulous standard, universities would lose more MPIA cases, and State taxpayers have to pay attorney’s fees to the prevailing parties. Md. Code, GP § 4-362(f) (“If the court determines that the complainant has substantially prevailed, the court may assess against a defendant government unit reasonable counsel fees and other litigation costs that the complainant reasonably incurred.”).

Finally, competition sensitive information is not always readily obvious to the lawyers. When reviewing Maryland Public Information Act (MPIA) requests, legal offices will have to expend substantial amounts of staff time determining whether there is sensitive information that could cause substantial harm if released. Additionally, if an USM institution is forced to release information, it could face breach of contract suits and tortious interference with business contracts/business operations suits from existing vendors/partners.

Therefore, we urge the committee to adopt an UNFAVORABLE report for HB712.



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