Testimony for the Senate Education, Energy, and the Environment Committee

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SB 555 – Public Information Act – Denials – Pending Litigation

UNFAVORABLE

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The ACLU of Maryland strongly opposes SB 555, which seeks to allow custodians to deny public record requests under the Maryland Public Information Act (MPIA) if they are seen as pertaining to "pending or reasonably anticipated" litigation.

This bill was put forward by the Office of the Attorney General, which we understand has offered to slightly narrow the scope of the proposed exemption by changing "pertaining to" to "because of" as it relates to requests that may concern any "pending or reasonably anticipated" litigation at issue. Nevertheless, this amendment does little to mitigate the severe chilling impact on government transparency and accountability that is almost guaranteed to result from the broad latitude provided by this bill's still highly speculative basis for denying access to vital public information.

As repeatedly emphasized by Maryland courts, public access to government records under the MPIA should be liberally construed in favor of maximal transparency and ease of access. See *Sheriff Ricky Cox v. Am. C.L. Union of Maryland,* 263 Md. App. 110, 126 (2024) (noting ". . . at its core, the MPIA is a disclosure statute that is meant to ensure that the government is accountable to its citizens, and the disclosure the Act requires is a public service that the Act directs government agencies to provide." (citing *Glenn v. Md. Dep't of Health & Mental Hygiene*, 446 Md. 378, 384-85 (2016); *Committee for Transit, Inc. v. Town of Chevy Chase*, 229 Md. App. 540, 145 (2016))).

Such open transparency is a proven cornerstone of democracy, especially as it relates to challenging any government-related misconduct. In addition to providing a means to understand and monitor government action, the MPIA offers an essential mechanism for obtaining the documentation necessary to address any related issues, whether that be

through the courts, the legislature, or other public advocacy channels. This is especially true where such documentation may not be otherwise available, such as in prison and police misconduct cases where an individual may not be directly provided with incident reports and other records evidencing the harm they experienced.

Without such documentation, it can be all but impossible to even assess the viability of any potential legal claims or other accountability measures, much less submit a civil complaint in good faith that comports with standards under Federal Rule of Civil Procedure 11(b)(3) requiring evidence-supported filings. If requests for these records were subject to denial under SB 555 based only on the supposed likelihood of a related legal challenge, the whole point of the MPIA's broad remedial purpose would be undermined.

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As SB 555 contains no language defining the "reasonably anticipated litigation" that could allow a custodian to withhold any related public information, it is imaginable that a wide breadth of potentially attenuated circumstances could be raised to unduly justify a denial. For example, if a person submits a letter to the government to simply preserve a potential tort claim against a state actor within the one-year deadline for this required notice[1], this could be taken as a sign of "reasonably anticipated litigation." This highly conceivable application of SB 555 would then foreclose access to any public records needed to actually evidence a claim and file in good faith, even if potential litigation was only a conjecture at the time of the letter's submission.

Similar denials under this bill could also occur in other unwarranted circumstances, such as where an individual seeks public information that unknowingly relates to a separate incident in a pending case, or concerns severe harm affecting a large class of people that could easily give rise to litigation (even if that is not a particular requestor's goal). If this bill takes effect, those seeking justice could feel forced to pursue accountability measures based on speculation rather than substantiated facts—an outcome that serves neither the public interest nor the courts.

While SB 555 seems to present as a bill aimed at protecting against the disclosure of sensitive, litigation-related information, there are a multitude of current provisions that already accomplish this goal. As opposed to the broad swath of records that could denied under this bill, existing exemptions are more narrowed to the scope of the protected information, such as the attorney work-product doctrine, health-related confidentiality provisions, individual privacy protections, and

[1] Md. Code, State Government § 12-106(b)(1).

limitations against the disclosure of certain investigative and law enforcement records.[2]

Where these and other protections do not apply, it is imperative to maintain access to public records, including those relating to pending litigation. While public access to the courts and its proceedings is fundamental to fair governance, SB 555 needlessly undermines such transparency and creates an unjustified barrier to information the public relies on to hold government actors accountable.

For the foregoing reasons, we urge an unfavorable report on SB 555.

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[2] See, for example, Federal Rule of Civil Procedure 26(b)(3) (protecting against the discovery of documents and tangible things prepared in anticipation of litigation or trial), and Md. Code, General Provisions §4-329(b) (denying public access to certain medical and psychological information) and §4-351 (providing grounds for denying access to certain investigative, security, and personal information, including information that would interfere with a valid and proper law enforcement proceeding; deprive the right to a fair trial or an impartial adjudication; constitute an unwarranted invasion of privacy; or endanger an individual's safety).