Testimony for the House Health and Government Operations 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, as currently amended, seeks to allow custodians to deny public record requests under the Maryland Public Information Act (MPIA) if they are created for the purposes of "pending or reasonably anticipated" litigation.

Even with the amended language, this bill still presents a severe risk of chilling government transparency and accountability due to the latitude it provides to deny access to vital public information beyond what is already protected by the attorney work product doctrine and the plethora of other existing exceptions from related public disclosures.

With these current protections already in force, this bill is simply redundant and unnecessary. First and foremost, the attorney work-product doctrine already protects against the disclosure of documents and other tangible things prepared in anticipation of litigation or in rendition of legal services. *See* Federal Rule of Civil Procedure 26(b)(3); *Baltimore Action Legal Team v. Off. of State's Att'y of Baltimore City*, 253 Md. App. 360 (2021).

If there are concerns with access to additional sensitive information beyond what is protected by this doctrine, there are other MPIA exceptions that already currently limit related public access, such as protections against the public disclosure of certain investigative, security, and personal information. *See* Md. Code, General Provisions § 4-351. This includes 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. Certain medical and psychological information is also exempt from disclosure under Md. Code, General Provisions §4-329(b).

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Beyond this bill's redundant application to information already protected by these existing provisions, we are deeply concerned by the wide door it would open to allowing government entities to hide records vital to needed transparency and accountability. **This risk is not hypothetical** – as demonstrated in the Appellate Court's decision in *Baltimore Action Legal Team v. Off. of State's Att'y of Baltimore City*, 253 Md. App. 360 (2021), the Baltimore City State's Attorney's Office tried to hide its "do not call list" of 305 officers with credibility issues by arguing that it broadly constitutes attorney work product due to the office's routine engagement in litigation. While the Court rightfully rejected this false equivalency, SB 555 would certainly provide more grounds for such bald assertions to withhold records by creating a separate exception. As a practical matter, custodians can share their agencies' vested interests in blocking public disclosures in order to limit potential litigation – the only thing this bill would do is make that easier by providing them with broader, unnecessary discretion.

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.

The amendments to SB 555 define reasonably anticipated litigation as "a situation where there is concrete evidence that litigation will likely occur based on current facts and circumstances." Even with this added language, this bill still significantly risks the denial of public records in unwarranted circumstances. With the existing protections, there are few related categories of information that could be seen as covered by this bill but not by the attorney work product doctrine or other current exceptions. As such, it can only be imagined that the proponents intend for its provisions to be applied to situations that are currently inapplicable (and rightfully so), such as records compiled, preserved, or summarized in response to pending or reasonably anticipated litigation (which could be framed as "created because of" the expectation of litigation).

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Likewise, the existence of "reasonably anticipated litigation" could be based on tenuous connections to circumstances that do not, and should not, be viewed as concrete evidence of upcoming litigation. This could include preliminary requests for evidence preservation; situations 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); or the submission of required notice of potential tort claims against government actors (as required within one year of an incident or injury under Md. Code, State Government § 12-106(b)(1) and Courts and Judicial Proceedings § 5-304(b)(1) in order to preserve a potential tort claim against a state or local government actor, even if any claims are still speculative in nature without the supporting public documentation needed to file a potential complaint in good faith).

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, the existing exceptions noted above are more narrowed to the scope of the protected information. 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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