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February 11, 2025

To: The Honorable Joseline A. Peña-Melnyk
Chair, Health and Government Operations Committee

From: Office of the Attorney General

Re: HB 821 - Public Information Act - Denials - Pending Litigation (FAVORABLE WITH AMENDMENTS)

The Office of the Attorney General (“OAG”) urges support for HB 821, with amendments. The bill would create a new exemption in the Public Information Act (“PIA”) that would allow—but not require—a custodian to withhold certain records relating to pending or reasonably anticipated litigation until the litigation is over. The exemption would be in addition to any other exemptions, like the attorney-client privilege or the attorney work product, that might apply to some of the records. But, like all discretionary exemptions, to invoke the exemption, the custodian would need to demonstrate that disclosure of the record(s) would be contrary to the public interest. *See* Md. Code Ann., Gen. Prov. § 4-343.

Based on discussions with stakeholders after the initial introduction of the bill, OAG is proposing amendments to clarify and narrow the scope of the original language. The bill, as amended, would read:

(B) SUBJECT TO SUBSECTION (C) OF THIS SECTION, A CUSTODIAN MAY DENY INSPECTION OF A RECORD ~~PERTAINING TO~~ **COMPILED OR CREATED BECAUSE OF** PENDING OR REASONABLY ANTICIPATED LITIGATION TO WHICH:

(1) THE STATE, A STATE AGENCY, OR A POLITICAL SUBDIVISION OF THE STATE IS OR MAY BE A PARTY; OR

(2) AN OFFICER OR EMPLOYEE OF THE STATE OR A POLITICAL SUBDIVISION OF THE STATE, BECAUSE OF THAT PERSON'S OFFICE OR EMPLOYMENT, IS OR MAY BE A PARTY.

This legislation would help even the playing field between government litigants and private litigants by placing at least some limits on the ability of opposing litigants to use the PIA to obtain early discovery or to circumvent discovery rules. Similar exemptions exist for similar reasons in at least seven other states: California, Delaware, Missouri, Oklahoma, Oregon, Texas, and Vermont. Another purpose of these types of exemptions is to protect a government agency's ability to litigate vigorously and protect its interests. Because government agencies do not have the same ability to utilize public records laws in litigation with private parties, this puts the State and local governments at an unfair disadvantage.

These are not just theoretical concerns. To take a few examples, OAG litigators have had cases when the opposing party submitted PIA requests asking for documents compiled or created because of the pending litigation while the discovery period in the litigation was still going on, or even though the court proceedings had been stayed. In addition, attempts to use the PIA for early discovery have often disrupted OAG's or our clients' ability to prepare for the litigation or fully investigate the facts surrounding the incident before being forced to provide records that might become important in the litigation. Sometimes, PIA requests (often from third parties allied with litigants) even seem to be designed specifically to disrupt the work of the OAG attorneys working on the litigation.

Beyond addressing the problem created by attempts to circumvent discovery rules and timelines, the proposed exemption would address another issue. It would clarify the ability of custodians to withhold sensitive documents created because of the litigation and that all parties assumed would remain confidential. Those types of documents could include, for example, settlement communications with the opposing party or communications with potential amicus supporters. Although many such records are already protected by existing privileges like the attorney work product doctrine or others, an exemption like this one would clarify that a presumptive protection applies to all these records, without having to determine document by document or line by line whether those documents are protected by an existing privilege or exemption. That, in turn, would cause significantly less disruption to the work of the government attorneys during the litigation.

In sum, OAG urges a favorable report on HB 821 with our proposed amendments. We are happy to answer any questions or talk with any opponents to the bill to work through concerns.