

Department of Legislative Services
 Maryland General Assembly
 2015 Session

FISCAL AND POLICY NOTE
 Revised

House Bill 755 (Delegate Cullison, *et al.*)
 Health and Government Operations Education, Health, and Environmental Affairs

General Provisions - Public Information Act - Enforcement, Fees, and Exemptions

This bill establishes the State Public Information Act Compliance Board and the Office of Public Access Ombudsman. The bill specifies the board’s membership and the duties of the board and ombudsman, including enforcement of the Maryland Public Information Act (MPIA). The board must report to the Governor and General Assembly by October 1 of each year. The Office of the Attorney General (OAG) must staff and provide office space for the board and the ombudsman. OAG must also, after consultation with specified entities, report to the Governor and General Assembly on findings and recommendations for improving the implementation of MPIA, as specified. The bill also alters provisions of MPIA related to public record inspections.

Fiscal Summary

State Effect: General fund expenditures increase by \$199,900 in FY 2016 for OAG to provide staff support for the board and to hire an ombudsman. The bill could also have a significant operational and/or fiscal impact on State agencies, although the actual impact depends on the number of MPIA requests and related complaints filed as a result of the bill, as discussed below. Revenues are not materially affected.

(in dollars)	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	199,900	254,600	266,500	278,900	292,000
Net Effect	(\$199,900)	(\$254,600)	(\$266,500)	(\$278,900)	(\$292,000)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: The bill could have a significant impact on local government operations.

Small Business Effect: Minimal.

Analysis

Bill Summary:

State Public Information Act Compliance Board – Membership

The board consists of five members. Membership must consist of (1) at least one member who is an attorney admitted to the Maryland Bar; (2) at least one member who is a representative from a nongovernmental nonprofit group organized in the State who works on transparency and open government issues and who is nominated by representatives of the open government and news media communities; (3) one member who has served as an official custodian, has knowledge of the MPIA, and who is nominated by the Maryland Association of Counties (MACO) and the Maryland Municipal League and; (4) three members who are private citizens and who are not custodians of public records, members of the news media, or staff members of organizations that represent public record custodian or applicant interests.

The Governor must publish notice on the Office of the Governor's website of the Governor's intent to consider applicants for board positions. The notice must contain specified information, including application procedures and criteria for selection. The Governor must solicit recommendations for board positions from representatives of the custodian, news media, and nonprofit communities; when evaluating applicants, the Governor must consider the need for diversity and the neutrality of the board, as specified. The Governor must appoint members with the advice and consent of the Senate, and must also appoint the board's chair. Board members serve for three years and may not serve for more than two consecutive terms. Initial terms expire as follows: one member on June 30, 2017; two members on June 30, 2018; and two members on June 30, 2019.

Board members may not receive compensation but are entitled to reimbursement for standard travel expenses.

Board Duties

The board must receive, review, and resolve complaints alleging that a custodian of a public record charged an unreasonable fee of more than \$350. The board must issue a written opinion as to whether a violation occurred and order the custodian to reduce the fee and refund the difference, as appropriate. The board must study ongoing compliance by custodians and make recommendations for improvements.

By October 1 of each year, the board must report to the Governor and General Assembly on the board's activities, the board's opinions, the number and nature of complaints filed with the board, and any recommendations.

Complaints and Board Opinions

Any applicant or designated representative of the applicant may file a complaint with the board that a custodian charged a fee of more than \$350 and that the fee was unreasonable. The complaint must contain specified information, including the identity of the custodian and the date and circumstances of the custodian's actions. The complaint must be filed within 90 days of the action that is the subject of the complaint.

After receiving a complaint, the board must send the complaint to the identified custodian and request a response. The custodian must send a response within 15 days after receiving the complaint. On request by the board, the response must include the custodian's basis for taking the initial action. If the board does not receive a response within 45 days after sending the notice, the board must decide the case on the facts before the board.

If the board receives sufficient information in the complaint and the response, the board must issue a written opinion on the disposition of the case within 30 days after receiving the response. If the board is unable to reach a determination, the board may schedule an informal conference with the complainant, the custodian, and any other person with relevant information. The board must hold the informal conference in a convenient location for the complainant and custodian; the board may allow the parties to testify via teleconference or to submit written testimony through email. The board must issue a written opinion within 30 days after the informal conference. If the board is not able to issue an opinion within these time limits, the board must state in writing the reason for the inability to issue an opinion and then issue an opinion as soon as possible but no later than 90 days after the complaint was filed.

A custodian's compliance with an order of the board is not an admission of a violation and may not be used as evidence in a civil proceeding. A person or governmental unit does not have to exhaust the bill's administrative remedy before filing suit. A complainant or custodian may appeal the board's decision; an appeal automatically stays the board's decision pending the circuit court's decision or for up to 30 days after the defendant serves an answer or otherwise pleads to the complaint, whichever is sooner.

The board may send custodians any written opinions that will provide custodians with guidance on compliance with MPIA. OAG must post all of the board's written opinions on the OAG website.

Public Access Ombudsman

OAG must appoint the ombudsman. The ombudsman must have been admitted to practice law in the State. OAG must publish notice of its intent to consider applicants for the position on its website; the notice must contain specified information, including application procedures and criteria for selection. The ombudsman's term is four years; the ombudsman continues to serve until a successor is appointed. An ombudsman who is appointed after a term begins serves for the remainder of the term until a successor is appointed. The ombudsman is a full-time State employee and is entitled to an annual salary as provided for in the State budget.

The ombudsman must attempt to resolve disputes between applicants and custodians over requests for public records, including disputes over (1) the custodian's application of an exemption; (2) redactions of information in the public record; (3) the custodian's failure to timely produce a public record or to disclose all records relevant to the request; (4) overly broad requests for public records; (5) the amount of time a custodian needs, given available staff and resources, to produce public records; (6) requests for or denials of fee waivers; and (7) repetitive or redundant applicant requests.

When resolving disputes, the ombudsman may not compel a custodian to disclose public records or redacted information in the custodian's physical custody to the ombudsman or an applicant, or to disclose information received from an applicant or custodian without written consent. However, information received from an applicant or custodian may be disclosed to the assistant Attorney General assigned to the Office of the Ombudsman.

Inspection of Public Records

If a custodian reasonably believes that it will take more than 10 working days to produce a public record, the custodian must indicate specified information in writing or by email within 10 working days after receipt of the inspection request, including the amount of time it may take to produce the record and an estimate of the range of fees that may be charged. Failure to produce a public record constitutes a denial of an application which may not be considered the result of a bona fide dispute unless the custodian provides the specified information and is working with the applicant in good faith.

A custodian that denies an application for inspection must, within 10 working days, give the applicant a written statement that includes an explanation of why the denial is necessary and, without disclosing the protected information, a brief description of the undisclosed record that allows the applicant to assess the applicability of the legal authority for the denial. A custodian may not ignore an application for inspection on the grounds that the application was intended for purposes of harassment.

Any aforementioned time limit may be extended for up to 30 days with the consent of the applicant; if the applicant seeks resolution of a dispute that is under the purview of the ombudsman, the time limit must be extended pending resolution of the dispute.

A custodian may charge an applicant a reasonable fee for (1) the search, preparation, and reproduction of a public record that is prepared, by request, in a customized format, and (2) for the actual costs of the search, preparation, and reproduction of a public record in standard format, including media and mechanical processing costs. Staff and attorney review costs included in the calculated actual costs must be prorated for each individual's salary and actual time attributable to the search and preparation of the record.

An official custodian may waive a fee if the applicant asks for a waiver and the applicant is indigent and files an affidavit of indigency.

Denials of Inspection

If an applicant files a complaint with the ombudsman challenging a denial of inspection by a custodian or the custodian's application of an exemption, the custodian must demonstrate that the denial or exemption is clearly applicable to the public record and that the harm from disclosure is greater than the public interest in access to the record.

Judicial Review

A complainant or custodian may appeal the board's decision to the circuit court with appropriate jurisdiction, as specified. A defendant governmental unit is liable to the complainant for statutory damages and actual damages that the court considers appropriate if the court finds that the defendant failed to disclose that the complainant was entitled to inspect the public record or to provide a copy that the complainant requested, or if the court finds that after temporarily denying inspection, the official custodian failed to petition a court for an order to continue the denial. Statutory damages assessed by the court may not exceed \$1,000.

The bill repeals specified provisions of law that allowed a person to seek administrative review if denied inspection of a public record by a unit is subject to Title 10, Subtitle 2 of the State Government Article.

OAG Reporting Requirements

OAG must, in consultation with MACO, the Maryland Municipal League, and stakeholders from the custodian, news media, and open government communities, report to the

Governor and General Assembly on its findings and recommendations for improving implementation of MPIA. OAG must submit an interim report by December 31, 2016, and a final report by December 31, 2017. These findings and recommendations must include (1) whether the board's neutrality and statutory duties are appropriate, including whether the board should be authorized to impose statutory damages and whether the board's and ombudsman's functions should be modified; (2) whether to merge the State Open Meetings Law Compliance Board with the State Public Information Act Compliance Board; (3) the use of fee waivers in general and for indigent applicants in particular; (4) an analysis of the custodian denial process; (5) an analysis of requested public records held by nongovernmental custodians and appropriate remedies to ensure public access; and (6) an analysis of State law exemptions outside of MPIA.

Current Law: MPIA grants the public a broad right of access to records that are in the possession of State and local government agencies. The Act's basic mandate is to enable people to have access to government records without unnecessary cost or delay. Custodians have a responsibility to provide such access unless the requested records fall within one of the exceptions in the statute. MPIA authorizes judicial review of the denial of a request to inspect a public record. Judicial reviews of denials occur in the circuit court where the records are located or where the complainant resides or has a place of business. These cases are required to take precedence on the docket, unless the court has other cases it considers of greater importance.

Generally, a custodian of a public record must permit inspection of the record at a reasonable time.

A custodian has to deny inspection of a public record or any part of a public record if (1) the public record is privileged or confidential by law or (2) the inspection would be contrary to a State statute, a federal statute or regulation, the Maryland Rules, or an order of a court of record. Denial of inspection is also mandatory for public records relating to adoption, welfare records, letters of reference, specified information about an individual maintained by a library, retirement records, certain police records, criminal charging documents, arrest warrants, personnel records, certain hospital and school records, records of certain State agencies, certain recorded and surveillance images, and captured plate data collected by automatic license plate reader systems. Denial of inspection is required for information in a public record relating to certain medical, psychological, sociological, and financial information; trade secrets; certain personal information about public employees; information about the security of an information system; and licensing records.

Unless otherwise specified, if a custodian believes that inspection of a part of a public record by an applicant would be contrary to the public interest, the custodian may deny inspection to the applicant of that part of the record. Permissible denials include

information relating to documents that would not be available through discovery in a lawsuit, certain information about publicly administered tests, research projects conducted by an institution of the State or a political subdivision, real estate appraisals of property to be acquired by the State prior to its acquisition, certain information on inventions owned by State public higher educational institutions, and trade secrets or confidential information owned by the Maryland Technology Development Corporation.

A custodian must provide an applicant who is authorized to inspect a public record with a copy, printout, or photograph of the public record, or provide the applicant with access to the public record to make the copy, printout, or photograph, upon the applicant's request. A custodian must provide the copy in a searchable and analyzable electronic format if the public record is in that format, the applicant requests the copy in that format, and the custodian is able to provide a copy in that format without disclosing confidential or protected information or information that the custodian has decided should not be inspected.

An official custodian may charge a reasonable fee for the search, preparation, and reproduction of a public record. The official custodian may not charge a fee for the first two hours that are needed to search for a public record and prepare it for inspection. If another law sets a fee for a copy of a public record, that law applies; however, the official custodian may otherwise charge any reasonable fee for making or supervising the making of a copy. The official custodian may also charge for the cost of providing facilities for the reproduction of the public record if the custodian did not have the facilities. The fee may be waived if the applicant asks for a waiver and the official custodian, after considering the ability of the applicant to pay the fee, determines that the waiver would be in the public interest.

A custodian must grant or deny an application to inspect a public record promptly, but no more than 30 days after receiving the application. Upon approving the application, the custodian must produce the public record immediately or within a reasonable period needed to retrieve the record, but not more than 30 days after receipt of the application. If the custodian denies the application, the custodian must (1) immediately notify the applicant; (2) within 10 working days, provide a written statement that includes specified information, including the basis for the denial; and (3) allow inspection of any part of the record that is subject to inspection and is reasonably severable. These time limits may, upon the applicant's consent, be extended for up to 30 days.

Background: The State Public Information Act Compliance Board (PIACB) is modeled after the Open Meetings Compliance Board (OMCB). The bill is intended to establish an appeals process for individuals who are charged a fee of \$350 or greater under MPIA. The goal of the bill is to create a centralized appeals process for all MPIA requests.

The Office of the Attorney General also staffs OMCB, keeps minutes, has produced an Open Meetings Act Manual, and publishes opinions of OMCB. PIACB differs from the OMCB in that OMCB are advisory only; OMCB may not require or compel any specific actions of the public body beyond requiring the public body to acknowledge any violations. According to the 2014 OMCB annual report, 32 complaints were submitted to the board in fiscal 2014.

Based on a review of available reports on open government laws in other states, the Department of Legislative Services observed several substantial variations among jurisdictions, including variations in (1) the ratio of open meetings complaints to public information complaints; (2) the enforcement and review process for state laws equivalent to MPIA; and (3) the role of the committees and offices, *e.g.*, some jurisdictions provide a formal appeals proceeding for complaints through designated offices and committees devoted to open government laws, while other jurisdictions require the designated offices and committees to field more general inquiries concerning open government laws. The following provides examples of experiences in other jurisdictions:

- In Hawaii, the Office of Information Practices administers the state's equivalent to the MPIA, the Uniform Information Practices Act (UIPA) and the state's Open Meetings Act (OMA) equivalent, the Sunshine Law. According to the office's fiscal 2013 annual report, the office fielded 1,227 formal and informal requests for assistance, including 177 formal requests. The office received 34 UIPA appeals by requesters who had been denied access to all or part of a requested record by an agency and 27 Sunshine Law complaints and requests for investigations and rulings concerning open meeting issues.
- In Illinois, the Public Access Counselor within the Office of the Attorney General, reviews matters dealing with the state's Freedom of Information Act (FOIA) and the state's OMA. According to the Public Access Counselor's 2012 annual report the office received 3,119 FOIA formal requests for review and 288 OMA requests for formal review.
- In New York, the Department of State Committee on Open Government provides advice on the Freedom of Information Law (FOIL), the Open Meetings Law, and the Personal Privacy Protection Law. According to the committee's 2013 annual report, committee staff prepared 141 advisory opinions, with 87 opinions pertaining to FOIL. It is not clear how the remaining opinions were distributed across the remaining categories.

- In Rhode Island, the Open Government Unit of the Office of the Attorney General investigates complaints for violations of the state OMA and the Access to Public Records Act (APRA). In 2012, the unit investigated 78 open government complaints, and issued 41 findings under OMA and 34 findings under APRA.
- In Tennessee, the Office of Open Records Counsel fields inquiries and provides advisory opinions on issues related to access of local government records under the Tennessee Public Records Act. The advisory committee on open government provides guidance and advice for the office of open records counsel. According to the 2014 Office of Open Records Counsel and Advisory Committee on Open Government Annual Report to the General Assembly, the office and committee received 1,697 total inquiries, including 816 from citizens, 138 from media, and 743 from the government. According to the report, 1,432 inquiries concerned public records, while 216 concerned open meetings, and 37 concerned meetings and records. Forty complaints were filed regarding alleged open meetings violations. Due to the variations in processes and inconsistency in how information is reported, it is not optimal to utilize experiences in other states to project potential statistics for the newly established board under the bill.

The bill will likely impact the amount of MPIA-related hearings held by the Office of Administrative Hearings. In 2012 and 2013, the Office of Administrative Hearings held 15 MPIA-related hearings each year.

State Fiscal Effect: General fund expenditures increase by \$199,872 in fiscal 2016, which accounts for the bill’s October 1, 2015 effective date. This estimate reflects the cost of OAG hiring (1) one full-time Public Access Ombudsman; (2) one full-time assistant Attorney General to staff PIACB; and (3) one support staff/administrative aide to assist PIACB and the ombudsman. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. OAG advises that it expects PIACB to receive significantly more complaints than OMCB; however, the Department of Legislative Services notes that because such a process does not yet exist in the State, the actual amount of complaints received as a result of the bill cannot accurately be determined.

Positions	3
Salaries and Fringe Benefits	\$185,701
Operating Expenses	<u>14,171</u>
Total FY 2016 State Expenditures	\$199,872

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

OAG additionally advises that the number of MPIA requests from inmates would increase as a result of the bill's fee waiver provisions for indigent individuals and that additional personnel may be needed to handle the increased workload. The Department of Public Safety and Correctional Services (DPSCS) also advises that it may receive an increased number of requests from indigent inmates as well as more inmate appeals of "unreasonable fees" under the bill; DPSCS notes that requests related to inmate records often exceed the bill's \$350 cap because the records are highly sensitive and complex. DPSCS therefore advises that it may also require additional personnel to handle any increased workload.

Other State agencies also advise that there may be a significant operational and/or fiscal impact as a result of the bill's altered procedural requirements for custodians and an increased number of requests and related complaints. A high volume of requests, the bill's accelerated timeline and additional requirements for responding to requests, and the bill's requirements for custodians during the complaint process may require agency employees to divert attention from other duties in order to manage MPIA requests and any subsequent complaints; most agencies do not have staff dedicated solely to such purposes. In particular, the Department of Housing and Community Development, Department of Transportation, and Comptroller advise that additional staff would be needed to adequately meet any additional workload.

The extent of the operational and/or fiscal impact depends on the number of additional MPIA requests and complaints received as a result of the bill and varies depending on the State agency involved and the sensitivity/complexity of the public record at issue.

Local Fiscal Effect: Similar to State agencies, local governments could experience a higher volume of MPIA requests and would be subject to the bill's accelerated timelines and additional requirements for responses and complaint resolution.

Additional Information

Prior Introductions: None.

Cross File: SB 695 (Senator Raskin) - Education, Health, and Environmental Affairs.

Information Source(s): Baltimore City; cities of Bowie and Takoma Park; Howard and Montgomery counties; State Department of Assessments and Taxation; Maryland Department of Agriculture; Baltimore City Community College; Department of Business and Economic Development; Department of Budget and Management; Department of Human Resources; Department of Natural Resources; Maryland State Department of Education; Maryland Department of the Environment; State Ethics Commission;

Governor's Office; Department of Housing and Community Development; Department of Disabilities; Department of Health and Mental Hygiene; Maryland Insurance Administration; Comptroller's Office; Judiciary (Administrative Office of the Courts); Department of Juvenile Services; Morgan State University; Maryland Department of Aging; Department of Public Safety and Correctional Services; Maryland Department of Transportation; University System of Maryland; Department of Veterans Affairs; Maryland Association of Counties; Maryland Municipal League; Department of Legislative Services

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