

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 401 (Delegate Barron, *et al.*)

Judiciary and Health and Government
Operations

**Public Information Act - Remote Access, Fee Complaints, Fee Waivers, and
Inspection of Judicial Records (Open Government, Better Government Act)**

This bill requires a custodian of a public record to waive a fee under specified circumstances and expands the jurisdiction of the Public Information Act Compliance Board to include reviewing and resolving complaints alleging that a custodian unreasonably charged or unreasonably failed to waive a fee of more than \$200. In addition, the bill establishes that provisions of Maryland's Public Information Act (PIA) may not be construed to allow a custodian of a judicial record to (1) withhold the names of judges from specified case records or (2) deny inspection of administrative records under specified circumstances. The bill expresses the intent of the General Assembly that each custodian adopt a policy to expand remote access to public records and increase government transparency.

Fiscal Summary

State Effect: The bill's changes can be implemented with existing resources. Potential minimal decrease in State revenues beginning in FY 2021, as discussed below.

Local Effect: The bill's changes can be implemented with existing local government resources. Potential minimal decrease in local government revenues beginning in FY 2021, as discussed below.

Small Business Effect: None.

Analysis

Bill Summary: The bill expresses the intent of the General Assembly that each official custodian adopt a policy to use the Internet and other technological advancements to the extent practicable and consistent with public policy to expand remote access to public records and increase the transparency of government.

Required Fee Waivers

The bill defines “public interest,” as it applies to fee waivers under PIA, to mean that the disclosure of requested information (1) sheds light on the operation or activities of the government; (2) is likely to contribute significantly to public understanding of those operations or activities; and (3) is not primarily in the commercial interest of the applicant.

A custodian must waive a fee for the search, preparation, and reproduction of a public record if the applicant asks for a waiver and (1) the applicant is indigent and files an affidavit of indigency or (2) the applicant is an inmate who is a person of interest of the public record, the public record relates to the inmate’s conviction or incarceration, and the applicant has not previously asked for a fee waiver for the requested record.

In addition, a custodian must waive the part of the fee that is not a standard charge for document duplication if the applicant asks for a waiver and is a representative of the news media. “Representative of the news media” means any person that (1) gathers information of potential interest to a segment of the public; (2) uses the person’s editorial skills to turn the raw materials into a distinct work; and (3) distributes that work to an audience.

Public Information Act Compliance Board

The board’s jurisdiction is expanded to include reviewing and resolving complaints alleging a custodian (1) charged an unreasonable fee of more than \$200 (instead of \$350, under current law) or (2) unreasonably failed to waive a fee of more than \$200.

Inspection of Judicial Records

Provisions of PIA governing electronic records may not be construed to allow a custodian of a judicial record to (1) redact, encrypt, or otherwise withhold the names of judges presiding over unshielded and unsealed actions from case records that have been posted for remote access or (2) deny inspection of an administrative record if the denial would frustrate or constructively limit the right of access by the public to information about the conduct of a judge in open proceedings.

The bill codifies the definition of “judicial records” set forth under the Maryland Rules as it pertains to access to such records and specifies that a judicial record is a public record for purposes of PIA.

Judicial Review

The bill establishes that the right of a person or governmental unit to seek judicial review of a denial of inspection under PIA applies to any denial of inspection of a public record, whether or not the custodian of the record has applied for a preliminary judicial determination as to whether the record is subject to inspection.

Current Law: PIA establishes that all persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees. Each governmental unit that maintains public records must identify a representative whom a member of the public may contact to request a public record. The Office of the Attorney General (OAG) must post all such contact information on its website and in any *Public Information Act Manual* published by OAG.

“Public record,” as it applies to PIA, means the original or any copy of any documentary material that is (1) made by a unit or an instrumentality of the State or of a political subdivision or (2) received by the unit or instrumentality in connection with the transaction of public business. A public record may be in any form.

“Person in interest” means (1) a person or governmental unit that is the subject of a public record or a designee of the person or governmental unit; (2) if the person has a legal disability, the parent or legal representative of the person; or (3) as to requests for correction of certificates of death under State law, the spouse, adult child, parent, adult sibling, grandparent, or guardian of the person of the deceased, as specified.

Fees and Fee Waivers

An official custodian may charge an applicant the actual cost of the search, preparation, and reproduction of any public record in a *standard* format, including the cost of media and mechanical processing. If an applicant requests a public record in a *customized* format, an official custodian may charge a reasonable fee for the search, preparation, and reproduction of the public record.

A custodian *may* waive a fee if the applicant is indigent and files an affidavit of indigency or the custodian determines, after consideration of specified factors, that the waiver would be in the public interest.

Public Information Act Compliance Board

The PIA Compliance Board, a five-member board appointed by the Governor, receives, reviews, and resolves complaints from applicants 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, if it finds that a custodian charged an unreasonable fee, order the custodian to reduce the fee and refund the difference, as specified.

Judicial Review

Under PIA, a person or governmental unit that is denied inspection of a public record or is not provided with a copy, printout, or photograph of a public record as requested may file a complaint with the circuit court for the county where the complainant resides or has a principal place of business or where the public record is located. A complainant may also appeal to the circuit court a decision issued by the PIA Compliance Board.

Access to Judicial Records

A custodian must 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.

Access to judicial records is generally governed by Title 16, Chapter 900 of the Maryland Rules. “Judicial record,” as defined under the Maryland Rules, encompasses five categories of records – administrative records, business license records, case records, notice records, and special judicial unit records – each of which are further defined under Maryland Rule 16-902. “Administrative record” generally means a record that pertains to the administration of a court, a judicial agency, or the judicial system of the State and is not a case record. “Case record” generally means (1) all or any portion of a court paper, document, exhibit, order, notice, docket entry, or other record, whether in paper, electronic, or other form, that is made, entered, filed, or maintained by the clerk of a court in connection with an action or proceeding; (2) a record pertaining to a marriage license issued and maintained by the court; or (3) a miscellaneous record filed with the clerk of the court pursuant to law that is not a notice record.

“Remote access,” as defined under Maryland Rule 16-902, means the ability to inspect, search, or copy a judicial record by electronic means from a device not under the control of the Maryland Judiciary.

Under Maryland Rule 16-914, if a custodian is in doubt whether a requested record is subject to inspection under the Maryland Rules or other applicable law, the custodian may apply for a preliminary judicial determination as to whether the judicial record is subject to inspection, as specified.

Background:

Abell Foundation v. Administrative Office of the Courts

In 2018, the Abell Foundation sued the Maryland Administrative Office of the Courts (AOC) in the Baltimore City Circuit Court to obtain access to a document containing a list of numeric codes used to identify Baltimore City District Court judges in Maryland Judiciary Case Search records. AOC moved to dismiss the complaint, claiming that judicial review of the denial of inspection was unavailable until a preliminary judicial determination concerning availability for inspection had been made in accordance with Maryland Rule 16-914. The court rejected the argument and eventually awarded summary judgment in favor of the plaintiff, ruling that Maryland Rule 16-905(f)(3) governing the denial of specified administrative records does not require the defendants to deny inspection of the requested record. The defendants appealed the decision to the Court of Special Appeals.

Fees under Federal Freedom of Information Act (FOIA)

The bill's changes with respect to fee waivers are similar to provisions under FOIA governing the assessment of fees for processing requests. Under FOIA, fees must be limited to reasonable standard charges for document duplication under specified circumstances, including when the requestor is a representative of the news media. "Representative of the news media," as it applies to the assessment of fees, means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

FOIA further provides that documents must be provided without charge or at reduced charge if disclosure of the information is in the public interest because it (1) is likely to contribute significantly to public understanding of the operations or activities of the government and (2) is not primarily in the commercial interest of the requestor.

2019 Joint Chairmen's Report

The 2019 *Joint Chairmen's Report* directed OAG to prepare a report providing information on the volume of the State's PIA requests. The [report](#), dated December 2019, revealed that a significant number of PIA disputes cannot be resolved by the Public Access Ombudsman alone and the PIA Compliance Board is underutilized as a result of its limited jurisdiction.

According to the report, fee matters eligible for board review represent a small fraction of PIA disputes; from early 2016 through September 2019, the board issued 22 opinions while the Ombudsman closed 800 cases. The report included several recommendations, including expanding the board's jurisdiction to review and decide all PIA disputes and requiring parties seeking board review to first attempt resolution through the ombudsman.

State Revenues: The bill requires fee waivers and partial fee waivers for processing PIA requests under specified circumstances. To the extent that the bill's changes limit the assessment of fees by State agencies, PIA-related fee revenues may decrease minimally. However, any such impact is not expected to materially affect State revenues. The December 2019 OAG report revealed that, in most cases, PIA requests are handled without fees being assessed.

Local Revenues: Local revenues may decrease minimally as a result of the bill's fee waiver provisions. However, any such impact is not expected to materially affect local revenues.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 758 (Senators Lam and Carter) - Judicial Proceedings and Education, Health, and Environmental Affairs.

Information Source(s): Office of the Attorney General; Comptroller's Office; Judiciary (Administrative Office of the Courts); Maryland State Department of Education; University System of Maryland; Morgan State University; Department of Budget and Management; Maryland Department of the Environment; Department of General Services; Maryland Department of Health; Department of Housing and Community Development; Maryland Department of Labor; Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Transportation; State Department of Assessments and Taxation; Maryland State Board of Elections; Maryland State Lottery and Gaming Control Agency; Public Service Commission; State Retirement Agency; Baltimore City; Caroline, Howard, Montgomery, and Prince George's counties; City of Bowie; Department of Legislative Services

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