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SB 351

January 19, 2021

TO: Members of the Senate Education, Health and Environmental Affairs Committee

FROM: Natasha Mehu, Director of Government Relations

RE: Senate Bill 351 – Public Information Act – Revisions

POSITION: OPPOSE

Chair Pinsky, Vice-Chair Kagan, and Members of the Committee, please be advised that the Baltimore City Administration **opposes** Senate Bill 351.

This bill alters Maryland’s Data Privacy Act in two fundamentally misguided ways, by: 1) adding confusing language that conflicts with the long-standing requirement that this law not impact Maryland’s Public Information Act; and 2) changing the definition of “personal information” from a clear list of data elements to a subjective definition dependent on what the information can be used to do “either alone or when combined with other information.”

First, the Maryland Data Privacy Act is clear that it is not intended to “alter or supersede the requirements of the Public Information Act.” Md. Code, State Gov.’t. § 10- 1302(a)(1). This is important because Maryland’s Public Information Act (“PIA”) applies to data shared between agencies within the same government. Md. Code, Gen. Prov., § 4-202; *Montgomery County v. Shropshire*, 420 Md. 362, 383 (2011). Bill Section 10-1304 (C) (concerning when governments can collect certain information) is in direct conflict with the PIA because it attempts to regulate intragovernmental data sharing.

Second, the bill defines personal information as that which could be combined with something else to reveal identity. Bill Section 10-1301(D). Currently, the list of data to protect is enumerated in Section 10-1301(c). To alter the definitional paradigm by making government officials the arbiters of what data will *do* when combined with other information is unworkable and will result inconsistencies. The bill provides no guidance on how to evaluate de-identified data that, when coupled with other data, may reveal identity. Government employees will be inconsistent in their individual determinations that other data exists to make the de-identifiable record deemed personal information under this bill.

The PIA does NOT suffer from this infirmity because it defines records solely by their contents; separating the definition of the record from the process of evaluating disclosure. The PIA makes clear that certain records may not be disclosed, even when de-identified. Maryland Public Information Act Manual, p. 3-11 (14th ed., Oct. 2015) (“[w]hat constitutes ‘identifying information’ . . . will depend on the specifics of each request.”) *accord* 90 Md. Op. Atty. Gen 45, 54-55 (2005) (“report might still be ‘about an individual’ if the unredacted information ‘sharply narrows’ the class of individuals to whom the information might apply or ‘likely’ could be used to identify the individual with ‘reasonable certainty’”); *accord Havemann v. Astrue*, Civil Action No. ELH-10-1498, 2012 WL 4378143, * 7 (D. Md. Sept. 24, 2012) (unreported) (holding that in context of certain labor records, zip code should not be disclosed). If there is a desire to further restrict the disclosure of certain information between government agencies, the PIA disclosure process should be amended to effectuate that change. Putting disclosure restrictions in a bill that claims it does not alter the PIA is ineffectual. So, too, would be the exemptions listed in Bill Section 10-1302(A)(2), as they would conflict with the PIA’s well-defined scheme for disclosure. Md. Code, Gen. Prov., § 4- 301, *et. seq.*

This confusion is compounded by the requirement in current Section 10-1304(b) that the law is to be applied to all contracts entered into as of July 1, 2014. While this date might have made sense when it was originally enacted, it is now arguably an unconstitutional impairment of existing government contracts. U.S. Constit., Art I, s 10, cl. 1; *see, e.g., Garris v. Hanover Insurance Company*, 630 F.2d 1001, 1004 (4th Cir. 1980) (holding stricter scrutiny of the applies when the government enacts a law that impacts contracts to which it is a party). It is also unworkable because it makes a requirement of a government contract (to protect certain government data) based on the vague and flexible definition of “personal information” as noted above. *See, e.g., Carroll County v. Forty West Builders*, 178 Md.App. 328, 377-78 (2008) (“an enforceable contract must express with definiteness and certainty the nature and extent of the parties’ obligations”) (citations omitted).

We respectfully request an **unfavorable** report on Senate Bill 351.