



Senate Bill 167

Public Information Act – Suits Filed by Custodians - Prohibition

MACo Position: **OPPOSE**

To: Judicial Proceedings Committee

Date: January 25, 2018

From: Leslie Knapp, Jr.

The Maryland Association of Counties (MACo) **OPPOSES** SB 167. While the bill's intentions are admirable, the bill seeks to solve an issue that has not surfaced in Maryland and the bill's language would create additional and unintended consequences for the Maryland Public Information Act (PIA).

SB 167 would prohibit a governmental unit from filing suit against a person who has requested to inspect a record under the PIA. The intent of the bill is to prevent a custodian from invoking a lawsuit as a first response to a records request. MACo does not believe this concern is an issue in Maryland.

To the best of MACo's knowledge, no state agency, county, or municipality has ever filed a suit in Maryland against a records requestor as an immediate response to a PIA request. Such an action is simply not contemplated by county record custodians.

The Office of the Attorney General recently released a comprehensive report on the PIA after a thorough 2-year process that included surveying both record requestors and custodians and allowing public comment. Despite comprehensively reviewing requestor and custodian interactions, the issue of preemptive lawsuits against requestors was never raised. *See Final Report of the Office of the Attorney General on the Implementation of the Public Information Act* (December 2017). The issue does not exist in Maryland and if it ever did become an issue, MACo would work with all involved stakeholders to remedy the situation.

The bill's language would also create several additional consequences for the PIA. Maryland's PIA law is designed to ensure the release of records that are in the public interest without unduly burdening a records requestor. There are numerous mechanisms in place to ensure this result, including: a Public Access Ombudsman, the Public Information Act Compliance Board, administrative appeals, and finally the courts. However, these mechanisms are also designed to protect custodians from abusive or bad faith requests and allow them to keep certain information confidential where required by law.

There are occasionally situations where a custodian needs to bring suit to resolve a request that may involve confidential information where the custodian would be legally liable if the information was to be released or to determine whether a request is abusive in nature (such as where a requestor makes

numerous small records requests instead of one large request to try to avoid paying reasonable research costs). SB 167 removes this needed balance.

The bill's vague language may also override existing PIA law that allows a custodian to temporarily deny access to records while seeking a court determination to determine if the release of the record would cause substantial injury to the public interest. Finally, a clever plaintiff could take advantage of the bill's language to potentially stave off a lawsuit by a government by filing a PIA request for the relevant information and then claiming that any subsequent government lawsuit is based on the PIA request, rather than the truly central matter.

SB 167 has sound intentions but offers a solution to a problem that does not exist in Maryland and would create numerous unintended consequences for custodians. Should the issue of preemptive custodian lawsuits ever arise in Maryland, there is a robust stakeholders' network in place that could address the issue. Accordingly, MACo requests the Committee give SB 167 an **UNFAVORABLE** report.