



House Bill 711

Data Privacy - Consumer Data, Public Records, and Message Switching System (Data Privacy Act)

MACo Position: **OPPOSE**

To: Economic Matters Committee

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From: Sarah Sample & Michael Sanderson

The Maryland Association of Counties (MACo) **OPPOSES** HB 711. In pursuit of a policy on sharing data with outside agencies who may use it for immigration enforcement, the bill creates a largely unworkable matrix of custodian mandates, exposing good faith government employees to personal liability under unreasonable expectations.

This bill requires county record custodians to assess the intent and motivation behind all public record requests to ensure they are not being made for the purpose of immigration enforcement. The bill applies to requests made by both government entities and unaffiliated members of the public. To this end, the challenges the bill presents to the record review, release, and redaction process are numerous.

Counties do not take issue with the intent of the bill to protect the private information of an individual that is not legally required to be shared with any federal agency or a member of the public. Balancing personal privacy with public interest is a founding principle of open government laws. This is vital to ensure public trust and government transparency and integrity. County objections to HB 711 arise primarily from three major areas in the process of implementing the bill.

First, the mandate for a subjective assessment, by a custodian, to determine the motivation for a request from a member of the public or a federal agency is of great concern. The traditional process of protecting unwarranted disclosures has historically been targeted at mandating denial of a record based on its content. The introduction of an interrogation to determine the intent of the requestor, rather than simply clarify the need for denial of the record, is against the founding principles of open government. The process is necessarily objective and was not built to scrutinize if the reason a member of the public wants the information is acceptable to the custodian. The contradiction here between the objective structure of the system and the insertion of an explicitly subjective process are undeniably incompatible and will lead to unintended consequences.

The second major concern is the burden on custodians to make these assessments accurately, of every requestor, while ensuring a record's timely release. Public record requests come in many forms, and the bill's mandate could commence a back-and-forth loop via emails, phone calls, and in-person discussions in the assessment of intent – which is both inefficient and ineffective, as intent could easily be misrepresented by the requestor to the custodian. This deliberation could also lead to a backlog in the expedient release of records that must adhere to legally binding disclosure timelines. This puts the

custodian in an almost impossible position, while the bill does nothing to address the penalties that exist for custodians when an error is made.

Finally, the language of the bill requires custodians to deny a court-issued warrant if the document does not specifically identify the record to be accessed. Not all court-ordered warrants identify individualized records to be made available. They could be requesting records of a particular nature or covering broad topics. While some warrants might have those types of clarifications written in the order, others will not, making the extent of required access unclear. This could put the custodian in a position of being held in contempt by the court for denying a lawful warrant because they believe the order is not explicit enough. Alternatively, they could face consequences for allowing access that could be considered too extensive due to lack of clarity.

The question of how best to ensure that privacy and access is maintained when a record request is made to a local government is an important one to address. HB 711 unfortunately has the potential to further complicate an already challenging role and fall short of its overall goal. For these reasons, MACo urges an **UNFAVORABLE** report on HB 711.