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HB 402 – Public Information Act – Personnel and Investigatory Records – Formal Complaints Against Public Employees

SUPPORT

The ACLU of Maryland supports HB 402, which would change the Maryland Public Information Act to ensure that members of the public who lodge complaints against public employees are not categorically barred from learning anything about the agency's investigation into their complaint, even including the discipline imposed when the complaint is sustained. The legislation is necessary because of the Court of Appeals concluded in *Md. Dep't of State Police v. Dashiell*, 443 Md. 435 (2015) that records of internal investigations into alleged police misconduct are "personnel records" which cannot be released under the Maryland Public Information Act (MPIA). Md. Code, Gen. Prov. § 4-311(a).

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Statutory Background

The MPIA begins with a legislative declaration that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees. To carry out the right [of access] . . . , unless an unwarranted invasion of personal privacy of a person in interest would result, this Act shall be construed in favor of permitting inspection of a public record." Md. Code, Gen. Prov. § 4-103. The general presumption of disclosure is withdrawn for specific categories of records or information, some of which *must be* withheld or redacted, and some of which *may be*, but are not required to be, redacted. "Personnel records," which are not defined in the statute, are among the category of records that must not be disclosed.

As a result, the Court of Appeals decision now means that all records of police investigations into alleged misconduct or citizen complaints are prohibited from disclosure, drawing a veil of secrecy around the one of the most important issues our society faces. As the MPIA itself recognizes, transparency in government is essential to trust in government. And that wisdom is particularly true in the context of law enforcement, as the police wield unique power in their authority to initiate criminal investigations, detain, search, arrest, and use force.

Case Background

In 2009, Maryland State Police Sergeant John Maiello telephoned Ms. Taleta Dashiell, a potential witness in a case he was investigating. When she didn't answer her phone, Sgt. Maiello left a message identifying himself and asking her to call back. He then continued speaking, thinking he had hung up, in an apparent conversation with another State Trooper, disparaging Ms. Dashiell as "some God dang n***ger. His statements were recorded on Ms. Dashiell's voice mail.

Understandably distraught at the message, Ms. Dashiell swore out an official complaint against Sgt. Maiello. It took no small amount of courage for her to do so, as a young African American who lives in a county with a long history of racial violence and oppression. Several months later, the MSP sent Ms. Dashiell a letter telling her that the department had sustained her complaint and taken "appropriate" action.

Ms. Dashiell, however, wanted to know more than mere platitudes from the MSP about how it had handled her case. She wanted to see if the complaint had been sustained only because the Trooper's words were captured on tape. She wanted to know if the investigation accounted for the fact that a trooper used slurs freely in conversation with other troopers. And she wanted to know what action had been taken. In short, she wanted to know whether the MSP had taken her complaint seriously. So she requested the documents relating to her complaint under Maryland Public Information Act ("MPIA"). The MSP refused to provide *any* information, claiming that *all* of the records about their investigation and discipline of the officer were confidential, including her own statement to investigators. In June, 2015, the Maryland Court of Appeals upheld the refusal to provide records, concluding that records of police investigations into alleged officer misconduct were "personnel records" and therefore could not be disclosed under the Maryland Public Information Act.

The result of *Dashiell*

The Court of Appeals' decision in *Dashiell* case adopted the categorical position that the public may never see for itself how government agencies police one of their own, even in instances of substantiated, official, on-the-job misconduct—even misconduct that is not itself secret because it is *directly involves* members of the public.

Take these examples, among many other possibilities:

- * An internal local law enforcement agency investigation concludes that an officer fabricated evidence to obtain a criminal conviction.
- * An internal state agency investigation determines that an agency official improperly steered agency contracts to a favored contractor.
- * An internal county agency investigation concludes that an agency supervisor was engaging in a pattern and practice of sexually harassing subordinate female employees.
- * Or the case in *Dashiell* itself: an internal investigation finds that a public official directed racial epithets at a potential witness in a criminal investigation.

Because of *Dashiell*, in each and every one of these cases, the public never gets to see what the government employee's agency did to investigate the matter or how the agency disciplined the employee. Indeed, they can't even know that the employee was disciplined or found to have committed misconduct. The agency's response never sees the light of day.

And the *Dashiell* opinion has already metastasized in other ways. In July, 2015, a Baltimore Circuit Court judge kicked a Baltimore Sun reporter out of the courtroom during a murder trial because the court was going to be hearing testimony about findings of misconduct against one of the officers who was going to testify. The judge relied explicitly on the *Dashiell* decision as a basis for concluding that the information could not be discussed in open court.¹

The bill

HB 402 would amend the Maryland Public Information Act to rectify the problems created by the Court in *Dashiell*. It does three things:

1. Overturns *Dashiell*, and says that records of investigations into alleged employee job misconduct are not "personnel records," and thus are not categorically barred from disclosure under the MPIA.

¹ J. Fenton, "Judge says state secrecy on police records extends to courtroom," Baltimore Sun, July 25, 2015. <http://www.baltimoresun.com/news/maryland/investigations/bs-md-ci-judge-ruling-police-misconduct-20150725-story.html>

2. Makes all investigations into employee misconduct "investigatory records," a category of records that are a permissive, rather than, mandatory denial under the MPIA (the status that they had prior to the *Dashiell* decision). Custodians have broad discretion to withhold such records when requested by 3rd parties, to protect legitimate public interests, and narrower discretion to withhold such records to "persons in interest," that is the people who are the subjects of those records.

3. Makes the person who files a complaint a "person in interest" with respect to records relating to that complaint. Being a "person in interest" gives a requestor a greater right of access to investigatory records under the MPIA, because records can be denied for only a specified set of seven (still broad) reasons (unless other barriers to disclosure under the MPIA apply), namely that the records would:

1. interfere with a valid and proper law enforcement proceeding;
2. deprive another person of a right to a fair trial or an impartial adjudication;
3. constitute an unwarranted invasion of personal privacy;
4. disclose the identity of a confidential source;
5. disclose an investigative technique or procedure;
6. prejudice an investigation;
7. endanger the life or physical safety of an individual.

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The net effect would be to lift the veil of secrecy from the basic facts about investigations into alleged misconduct, and ensure that the victims of such misconduct could get appropriate information about their own complaints, subject to the existing restrictions in the MPIA that protect against the release of sensitive information.

Conclusion

As a result of the *Dashiell* decision, no one outside of law enforcement, or any other government agency, has a right to see or know anything about how the agency addresses confirmed incidents of misconduct, or how it investigates, or fails to adequately investigate, allegations of misconduct. By flouting the public's interest in obtaining assurance that official misconduct is properly addressed, this level of official secrecy profoundly undermines the public trust in law enforcement, and government in general, that must exist for government to function effectively. "Trust us" is simply not an adequate response.

This bill restores the necessary balance by rejecting the categorical denial of access to such records and information. It provides access to basic information about the most important functions of government, namely addressing abuses of power, provides the victims of such misconduct with a greater right of access to underlying documents, all while preserving the legitimate privacy and other interests of government employees and officials.

For the foregoing reasons, the ACLU of Maryland supports HB 402.