

**Testimony of
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On [Senate Bill 740](#) (crossfiled as House Bill 37)
Access to Public Records; Electronic Documents
Before the Committee on Education, Health, and Environmental Affairs
Maryland Senate
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I want to applaud you for attempting to update Maryland's archaic Public Information Act by making public records more accessible in an electronic format. Unfortunately, this bill may do more harm than good. My colleague Greg Smith is addressing the sins of commission. My comments will focus on the sins of omission.

Last April I wrote an op-ed in the Washington Post entitled [Maryland's Fake Open Government](#), which I am submitting along with my written testimony today. The core problem addressed in that op-ed is the lack of credible enforcement of Maryland's existing Public Information Act. It's one thing to have laws mandating open government; it's a very different thing for those laws to be enforced when it's not in the self-interest of public officials to comply with the law.

The current law works reasonably well for powerful special interests who can afford to litigate and enforce the law. It also works reasonably well for the press, which can use the court of public opinion rather than the court of law to enforce the law. But for average citizens seeking to hold their government accountable, the law is often little more than a cruel joke.

Let us put aside the proposed law's many exemptions and vague language, which are likely to be abused by those seeking to avoid democratic accountability.

Let's furthermore assume that the law is crystal clear about what is and is not legal.

Due to a lack of credible enforcement mechanisms for the average citizen, the law would still amount to little more than empty parchment promises. To add credibility to open government laws, some states allow citizens to be reimbursed for their costs, including the cost of litigation, when seeking to enforce the law. Some even provide for sanctions when the government willfully violates the law. I would encourage you to add such reimbursement and sanction provisions to your legislation.

I would also encourage you to add privacy provisions to protect citizens from harassment when they try to enforce the law. Several months ago the *New York Times* ran a front page story about an Indian peasant who was murdered by government officials who didn't want him seeking certain public records. Although this is surely an extreme example of harassment that is not a concern in Maryland, other types of harassment in Maryland are common and widely feared by average citizens seeking to use the Public Information Act. One easy solution would be to require that public information officers who process the Public Information Act requests share those requests only on a need-to-know basis and don't disclose the name of the requester along with the request.

However, the gold standard in public records law enforcement today is to put public records online so that the public need not file a Public Information Act request. By eliminating the need for a request, agencies can avoid penalties for non-compliance and citizens need not fear harassment because the information can be accessed anonymously.

I would recommend that the focus of attempts to modernize the Public Information Act should be on putting public records online—and to do so in a way that preserves both the data and metadata in the original records.

For example, all new government computer database systems that cost more than \$100,000 should be required to be web accessible, with automatic redaction built into the design. With such a system, citizens would not have to file a Public Information Act request to access public information; they could simply access it online.

Even better, Maryland should follow the Federal government's example and move to governmentwide cloud computing. As part of this shift to cloud computing, public records should be made web accessible with automatic redaction built into the design. This governmentwide approach to computing would not only greatly reduce the cost of modernizing access to public records in Maryland but also greatly reduce the cost of Maryland government IT more generally.

I would also suggest that preventing Maryland's government agencies from using computer technology to reduce openness should be a high priority, perhaps the highest priority of this committee. For example, recently purchased computer systems in Maryland have often been a disaster for public records access because instead of generating printed reports subject to the Public Information Act, agencies have simply been viewing the reports online, thus putting them beyond the reach of the public. Similarly, something as simple as authoritative time stamps on online documents—something we all take for granted on printed documents—are essential if public records are to have the same level of democratic accountability that they had in the print world.

I don't have time here to describe all the ways governments in Maryland are using new computer technology to avoid complying with both the spirit and letter of Maryland's Public Information Act. But I would suggest that this committee keep in mind the maxim: first, do no harm. Information technology can be used just as easily to harm public access as to enhance it.

The basic problem with SB740 is that what you're doing is trying to fix a horse and buggy contraption (that is, information-by-request) when the car (that is, the Internet) has long since been invented. The horse and buggy owners are more than happy to distract you with such a public policy agenda. But I think it's sad that in the year 2011 we're having a debate we could have had decades ago and are so clearly missing the opportunities obvious for the grasping.

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