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**CITY OF BALTIMORE**

**BERNARD C. "JACK" YOUNG**  
Mayor



**DEPARTMENT OF LAW**

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September 4, 2020

The Honorable President and Members  
of the Baltimore City Council  
Room 409, City Hall  
100 N. Holliday Street  
Baltimore, Maryland 21202

Re: City Council Bill 20-0496 – Records Management – Modernizing,  
Correcting, and Conforming

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 20-0496 for form and legal sufficiency. The bill would repeal the current Subtitles 10 (City Records) and 11 (City Archivist and Records Management Officer) of Article 1 of the City Code and replace them with new Sections 10-1 through 10-12 of Article 1 concerning records. The bill would create a City Records Management Officer position appointed by the Director of Legislative Reference that would work with Record Officers appointed by each City agency, in order to create record retention schedules for those agencies. The City Records Management Officer must adopt rules and regulations to carry out the requirements of this bill. In addition, the City Records Management Officer position would offer those record retention schedules to the State Archivist for approval, as required in state law. The bill would also set forth how records could be destroyed, preserved and archived.

Applicable State Laws on Records

Maryland state law puts record requirements on all public officials, which includes every government elected official and employee including local government officials. Md. Code, State Gov.'t, §§ 10-614(d). Records are defined by state law to mean "any documentary material in any form created or received by any agency in connection with the transaction of public business." Md. Code, State Gov.'t, § 10-614(e). This includes all paper records and electronic records, including emails, text messages, voice mails and hard drives. COMAR 14.18.02.02.B.9(b). It also includes legislation, plats, maps, and portraits. COMAR 14.18.02.02.

Destruction of government records is not permitted unless it is done in accordance with a record retention schedule approved by the Maryland State Archivist. Md. Code, State Gov.'t, § 10-615(4), (5); COMAR 14.18.02.05.B. A City record retention schedule is not official until it is approved by the State Archivist. COMAR 14.18.02.07.C(6). Once a record is no longer needed by the City and ready for destruction, it must be offered first to the State Archivist for that office to determine if it wants to keep the record. Md. Code, State Gov.'t, § 10-616(a). If the State Archivist declines to preserve the record it will send written approval permitting destruction. Md. Code, State Gov.'t, § 10-616(c). Once that written approval is received, the record may be

destroyed but a certificate of that destruction must be sent back to the State Archivist. Md. Code, State Gov.'t, § 10-616(c)(2); COMAR 14.18.02.15. There are special state rules for reproductions of records (by electronic copy or microfilm, for example) but those also require prior consultation with the State Archivist. Md. Code, State Gov.'t, § 10-619.

#### Amendments required in this bill to conform to State Law

There are several sections of the bill that must be amended to comply with existing state laws.

#### *Affiliated Entities*

First, the bill attempts to legislate the record practices of “affiliated entities,” most of which are not part of the Mayor and City Council of Baltimore. The Baltimore City Police Department is a state entity and the City is expressly forbidden from enacting laws that interfere with the Powers of the Police Commissioner. Code of Public Local Laws of Baltimore City, §§ 16-2; 16-7(13) (Police Commissioner responsible for record management and destruction); City Charter, Art. II, § (27).

The Baltimore City Board of Liquor License Commissioners is a state entity and the provisions in state law do not give local governments control over the liquor boards, but rather have given the local boards power to create their own rules and regulations governing their operations. Md. Code, Alch. Bev., §§ 1-201; 12-201; 12-210; *Coalition for Open Doors v. Annapolis Lodge No. 622*, 333 Md. 359, 373 (1994); Md. Code, Gen. Prov., §§ 5-103 (defining local liquor boards as subject to local ethics rules); 5-807.

Similarly, the Housing Authority of Baltimore City is a separate legal entity that has power to make its own rules and regulations and carry out its state given power. Md. Code, Hous & Cmty Dev., §§ 15-102, 15-104; 12-502.

The Enoch Pratt Free Library is the creature of an 1882 testamentary gift of library collections and funds. 1882 Md. Laws, ch. 181. “The title to said Library, its branches, books, and all other property, to be vested in the Mayor and City Council of Baltimore, the control and management of the said Library and other property to be in said Board of Trustees[.]” *Id.* This state law gave the Library’s Board of Trustees the power “to do all necessary things for the control and management of said Library and its branches.” This state law contemplated a local ordinance (1882 City Ordinance 106) to form the corporation, accept Pratt’s donation and the terms of his annuity and other obligations. The Ordinance was approved by the voters of the City of Baltimore in October of 1882. It is now codified as Article 18, Subtitle 7 of the Baltimore City Code. *See also* Subtitle 17 of the Public Local Laws. Despite its presence in the City Code, it has been deemed an instrumentality of the State of Maryland “operated by a self [-] perpetuating board of trustees to safeguard it from political manipulation.” *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F.2d 212, 216, 219 (4<sup>th</sup> Cir. 1945), *cert. denied*, 326 U.S. 721 (1945). The library is “a private endeavor subsidized with government funds.” 62 Opinions of the City Solicitor at 399, 401 (1970); *accord* 77 Opinions of the City Solicitor 32, 35 (1985) (Enoch Pratt Free Library is not a city agency and therefore is not required to comply with provisions of the Baltimore City Administrative Manual).

The Baltimore Development Corporation is a not-for-profit corporation. *City of Baltimore Development Corporation v. Carmel Realty Associates*, 395 Md. 299, 308 (2006). Although it was declared to be subject to Maryland's Public Information and Open Meetings' Act, it is not clear that the City is able to legislate its internal operations. There are no local laws that regulate this entity, except for the City's Ethics law, which is authorized and required by state law. Md. Code, Gen. Prov., §§ 5-103); 5-807.

The Pimlico Community Development Authority is a state created entity that exists to receive certain video lottery terminal revenues. 2005 Md. Laws, ch. 603; Md. Code, Bus. Reg. §11-1201, *et. seq.*; Md. Code, State Gov., § 9-1A-31(a)(3)(ii). It is the local development council for the Pimlico area responsible for partnering with the local government to plan for the expenditure of local grant funds. Md. Code, State Gov., § 9-1A-31(a)(3)(ii). It is clearly separate from the local government.

The Local Development Council of the South Baltimore Video Lottery Terminal, also known as the "Baltimore Casino Local Development Council (LDC)" is the local development counsel that must partner with the City to plan for the expenditure of local grant funds for the area near the Horseshoe casino. Md. Code, State Gov., § 9-1A-31(d)(1); *see also* [https://baltimoreldc.files.wordpress.com/2018/10/ldc\\_operatingprocedures\\_revised\\_161101.pdf](https://baltimoreldc.files.wordpress.com/2018/10/ldc_operatingprocedures_revised_161101.pdf) . Just as with the Pimlico Community Development Authority, it was created by state law to be separate from the local government. Rather, the local government that must "submit the plan to the local development council for review and comment before adopting the plan or expending any grant funds" and in turn, the "local development council shall advise the county or municipality." Md. Code, State Gov., § 9-1A-31(d)(2), (3).

The South Baltimore Gateway Community Impact District Management Authority is an entity created pursuant to specific state authority and is specifically not an agency of the Mayor and City Council of Baltimore. City Charter, Art. II, § (69)(e)(1)(viii); *Kimball-Tyler Co. v. Baltimore*, 214 Md. 86, 94 (1957) (Article II of the City Charter is state law, and constitutes powers granted to the City by the General Assembly and can only be modified by it); *accord* 87 Op. Atty Gen. Md. 187, 191, n. 8 (2002). It is chiefly designed as a recipient of certain local impact grants from gaming revenue. Md. Code, State Gov., § 9-1A-31(b)(3)(i). It was made expressly subject to certain city procurement laws but in all other respects was given power to do all things necessary to carry out its powers, including adopting its own by-laws. City Charter, Art. II, § (69)(d).

Finally, the Parking Authority is a creature of both City and State law, although it is not an agency of the Mayor and City Council of Baltimore. Md. Code, Local Gov't, § 18-101, *et. seq.*; City Code, Art. 13-6(a). While the City Council is given some legislative control over the entity, it is unclear if that would extend to record retention practices. Md. Code, Local Gov't, §§ 18-104, 18-108, 18-109.

Even if these entities were removed from the bill, it does not change any of those entities' existing responsibilities under state law. Md. Code, State Gov.'t, §§ 10-614(d). Rather, this change just reflects the limits of the City's ability to legislate with respect to these non-City entities. An amendment to this effect is attached.

### *Definition of Agency*

Next, while the bill attempts to define “agency” broadly, it is a term that is generally associated with the executive and not legislative branches. Since the state record retention laws apply to all public officials, which would include all elected officials, and all those in the City Council and Board of Estimates, it might be best to enumerate those within the bill to be clear that this law is intended to cover them. An amendment to this effect is attached.

### *Definition of Record*

Next, the bill defines “record” to exclude several types of documents like extra copies or correspondence “on which no administrative action is recorded.” This definition does not comport with the state definition of a record, which captures all “documentary material in any form created or received by any agency in connection with the transaction of public business.” Md. Code, State Gov.’t, § 10-614(e). State regulations further clarify that while the term “record” is to encompass every document associated with public business, some records may be considered permanent or non-permanent. COMAR 14.18.02.02.B.9(b). The designation of permanent and non-permanent records can be made by local law. COMAR 14.18.02.02.B.6-7. However, all records are to be included in record retention schedules. COMAR 14.18.02.02.B.13. The bill should be amended to rename those records listed now as “exclusions” to be instead those that the City believes should be designated as non-permanent records in accordance with state law. This will insure that the City’s definition comports with state law and that its record schedules cover all records. An amendment to this effect is attached.

### *Conforming to State Disposal Process*

The bill also creates a process for the disposal of City records in Section 10-10. The bill is careful to note that it does not apply to any record that has been accepted by the State Archivist. However, the bill does not reference the state law requirement that all records no longer needed must be offered to the State Archives first and then only destroyed if the State Archivist declines to accept the record. Md. Code, State Gov.’t, § 10-616. The bill should be amended to reflect that the process for disposal set forth in Section 10-10 is in addition to this state law. An amendment to this effect is attached.

### *City Solicitor and Auditor Objections to Destruction*

The bill provides that the City Solicitor and the City Auditor be given thirty days’ notice before the destruction of records in the City storage center. If either object, the record is then delivered to the City Solicitor or City Auditor instead of being destroyed. It is unclear why the record that arguably should be kept would be delivered to the City Solicitor or Auditor instead of remaining in the City storage center. Additionally, the records to be destroyed may be covered by confidentiality, privilege or other requirements that make them unable to be shared with the City Auditor; for example, personnel files. Md. Code, Gen. Prov., §§ 4-311; 4-202; *Montgomery County v. Shropshire*, 420 Md. 362, 383 (2011) (the PIA applies between the government and a third party as well as between record custodians within the same government). Thus, it would be better to retain those records in the City Storage center. An amendment to effectuate this change is attached.

*Records of Historical Significance*

Section 10-11 provides that the City Records Management Officer can deem any record to be of historical significance and transferred to the Director of Legislative Reference. While the intent was likely to capture only records that are no longer being utilized by an agency, the bill should be amended to make this clarification. This Section also appears slightly out of place as the determination of which records are of historical significance would likely take place in the adoption of agency retention and disposition schedules, in consultation with the agency head. Moreover, no City entity can simply require the State Archivist to take a record that the City deems to be of historical importance because state law gives the option to do so to the State Archivist. To rectify these issue, it is best to put this historical preservation piece within the regular duties of the City Records Management Officer to be clear that records of historical importance be addressed in record retention schedules and offered to the State Archives in accordance with state law. An amendment to this effect is attached.

Assuming the bill is amended as noted above, the Law Department can approve it form and legal sufficiency.

Very truly yours,



Hilary Ruley  
Chief Solicitor

cc: Dana P. Moore, Acting City Solicitor  
Matthew Stegman, Mayor's Office of Government Relations  
Caylin Young, President's Legislative Director  
Elena DiPietro, Chief Solicitor  
Victor Tervalá, Chief Solicitor  
Ashlea Brown, Assistant Solicitor

**AMENDMENTS TO COUNCIL BILL 20-0496**  
(1<sup>st</sup> Reader Copy)

Proposed by: Law Dep't

**Amendment No. 1** – removing references to affiliated entities

On page 2, delete lines 23 through 31. On page 3, delete lines 1 through 5. On page 3, in line 8 and 9, delete “OR OF ANY AFFILIATED ENTITY”

**Amendment No. 2** – broadening the definition of “agency”

On page 3, in line 8, after “GOVERNMENT” insert “INCLUDING ALL IN THE EXECUTIVE AND LEGISLATIVE BRANCHES, AND ALL ELECTED OFFICIALS”

**Amendment No. 3** – changing “excluded” records to “non-permanent” records

On page 3, in line 26, delete “EXCLUSIONS” and substitute “NON-PERMANENT RECORDS” and on page 3, in line 27, before “RECORD” insert “NON-PERMANENT” and in the same line delete “DOES NOT” and add an “s” after “INCLUDES”

**Amendment No. 4** – conforming City disposal process to State requirements

On page 7, in line 8, after “SCHEDULE” insert “AND THE DISPOSAL PROCESS, CURRENTLY CODIFIED IN SUBTITLE 6 OF TITLE 10 OF THE STATE GOVERNMENT ARTICLE OF THE MARYLAND CODE”

**Amendment No. 5**– keeping records at City Storage Center when Solicitor or Auditor objects

On page 7, in lines 32 through 34, delete “ORDER THE PROMPT DELIVERY OF THE RECORDS SPECIFIED IN THE OBJECTION TO THE CITY SOLICITOR OR THE CITY AUDITOR, AS THE CASE MAY BE” and substitute “RETAIN THE RECORD”

**Amendment No. 6**– clarifying the designation of records of historical significance is part of the regular duties of the City Records Management Officer and part of the require record schedules

On page 8, delete lines 1-10 in their entirety; and on page 8 in line 11 delete “10-12” and substitute “10-11”; and on page 5 in line 22, delete “AND”; and on page 5, at the end of line 25 after the semi-colon, insert “AND”; and in the “(III) THE IDENTIFICATION AND PRESERVATION OF RECORDS NO LONGER NEEDED BY AN AGENCY THAT ARE OF HISTORICAL SIGNIFICANCE;”