# Written Testimony for the

# Maryland General Assembly’s Joint Committee on Transparency and Open Government for the Hearing on Maryland’s Public Information Act

# Wednesday, November 6, 2013

Good afternoon. My name is J.H. (“Jim”) Snider. I am the President of iSolon.org and, as you know, a regular commentator before your committee.

Please accept my apologies for missing my scheduled public testimony at this morning’s hearing. I mistakenly had the hearing on my calendar for this afternoon. My comments below have been slightly updated in light of the testimony from this morning.

With the exception of the last witness today (I counted ten witnesses), all the witnesses were government officials responsible for administering the Public Information Act. The result, not surprisingly, was an incredibly one-sided view of how the Public Information Act is working in practice and what needs to be reformed. The comments were not necessarily incorrect, just a very partial picture of the strengths and weaknesses of the Public Information Act.

Before I start my critique, I want to applaud Chief Counsel Adam Snyder, who fulfilled a non-trivial Public Information Act request from me regarding legislative counsel to the Ann Arundel County School Board Nominating Commission in a most prompt, thorough, and professional manner. It was a delight getting from his office the information I sought and was entitled to under the law.

I have previously spoken to this committee about various weaknesses of the Public Information Act. Today I want to focus on two related issues: 1) inconsistent and arbitrary enforcement of the Public Information Act on an intra-agency rather than inter-agency level (only the latter was mentioned at this morning’s hearing), and 2) harassment of requesters seeking sensitive but public information. The variations in compliance I want to focus on are fee waivers, feel-good versus sensitive information, confidentiality of requests, and harassment of requesters.

I’m going to focus on my experience with my local public school system, but I believe the recent Brouhaha over the *Washington Post*’s Public Information Act request concerning Attorney General Doug Gansler’s use of his security detail might nicely illustrate the general point I am making about inconsistent and arbitrary implementation. There have been allegations that the Governor’s office was quite helpful to the *Washington Post* reporter in accessing those documents in a way his office hasn’t been helpful to reporters digging for dirt on the Governor’s administration.

If you conducted a serious oversight hearing on that, I suspect you’d learn a lot about how the Public Information Act is occasionally implemented in a self-serving political way—quite different than the whitewashed account you got today. I recognize that politically that’s not a viable option for you, but I hope that thought experiment might help convince you that my experience with my local public school system is not an outlier.

During the last five years, I’ve used the Public Information Act to seek comprehensive salary information from the Anne Arundel County Public School System (AACPS). As you may know, that information is legally public by Maryland statute. But it is also considered very politically sensitive information. Even school board members have trouble accessing that information without risking ruffling feathers, which most of them are too politically sophisticated to have any interest in doing.

When I last requested the nominally public salary information in 2008 (compensation covers about 82% of the school operating budget), the AACPS Public Information Officer who administers the Public Information Act for the school district sent an email to thousands of school employees alerting them to my request. He apparently also contacted at least one member of the General Assembly, perhaps via the AACPS legislative liaison, asking that the law be overturned allowing a citizen such as myself to access such information. Not surprisingly, this generated enough harassing phone calls to my home that it caused family distress. After all, I had a child in AACPS. More generally, it has always been my impression that when I submit a Public Information Act request to AACPS, just as when I write a published op-ed about AACPS (e.g., various columns in the *Washington Post* and *Education Week,* such as [America’s Million-Dollar Superintendents](http://www.edweek.org/ew/articles/2006/12/13/15snider.h26.html)), a heads up about my request is distributed to senior AACPS staff up to the school superintendent. I’m not saying that such behavior isn’t perfectly rationale from the standpoint of the AACPS PR office, which also is in charge of Public Information Act compliance, but such behavior should raise a red flag.

A vital principle of a healthy democracy is that citizens can access information about the vital workings of their government without fear of harassment. For example, when one watches a video of a public hearing or reads a government budget, one should be able to do so anonymously. If one cannot, most citizens won’t ask for controversial information for fear of harassment, and the work of democracy won’t be done. The alternative of relying on the local newspaper should be unsatisfactory. I believe that Public Information Act officers should treat requesters equally and share information about their requests only on a need-to-know basis. It’s also inviting undesirable behavior when the PR office is given the Public Information Act portfolio. That’s a lesser concern but at a minimum such an assignment should be frowned upon.

After my experience in 2008, I wrote an op-ed in the *Washington Post* ([Maryland’s Fake Open Government](http://www.washingtonpost.com/wp-dyn/content/article/2010/04/17/AR2010041702662.html)) that touched on my experience with AACPS. When I submitted similar requests in 2013, my request was handled discreetly, or at least not broadly distributed to AACPS staff. But I’d like to highlight two other problems. First, I asked for a fee waiver because of the public interest value in disseminating information concerning a majority of the AACPS operating budget. AACPS replied that it has a blanket policy not to provide fee waivers. Notwithstanding that the Public Information Act encourages fee waivers for requests like my own, this was a bit bizarre because AACPS and the County Government regularly waive fees in complying with the Public Information Act. They just do it on an ad hoc basis depending on their own arbitrary judgment. Do you really want to allow fee waivers to be conducted in such an arbitrary way? Shouldn’t the law be uniformly applied and thus impartial?

Second, after the search was conducted I was sent a bill for the search without my prior agreement to pay for it. I considered that harassment. It was a very different type of harassment than I got in 2008. But I considered the intent just the same. Instead of threatening to make me and my children pariahs, I was being threatened with being treated like a criminal. The Public Information Act was being used to intimidate me rather than empower me in the way it was supposedly intended. Should such ex post facto fees be allowed?

Of course, the best solution of all would be to post AACPS compensation information online proactively so that citizens wouldn’t have to rely on the Public Information Act to access this public information. AACPS recently purchased a multi-million dollar software payroll program that should facilitate such one-time online posting. There is no doubt that many citizens, including school board members and the press, would make use of such a public database. It would be a widely used file, just the type the Public Information Act says should be proactively posted online. But, of course, it never will be. AACPS would rather waste thousands of hours of its staff time repeatedly generating the same information than post this information online, which illustrates why leaving such decisions to local governments and agencies is a bad way of implementing right-to-know laws regarding politically sensitive information—exactly the type of information the Public Information Act was intended to make available.

The ultimate inconsistency is in how insiders vs. outsiders get access to such nominally public information. A basic principle of open government is that outsiders, the public, should have access to public documents at the same time that insiders do. For example, the Public Information Act has no time delay, other than the 30 days for compliance in responding to a request, saying that political insiders should have privileged access to public documents. Yet it is obvious that they do. The superintendent and school board members routinely get access to public documents without filing Public Information Act requests for them and enduring all the resulting hassle and extra costs. It would seem to me a simple and desirable revision of the Public Information Act that if the school board as a whole is requesting access to a particular document, then it is a widely requested document and should be proactively posted online and at the same time as the school board gets access to the document. Of course, most senior school system staff would rather cohabitate with a black widow spider than agree to such a principle. Nevertheless, it should be a bedrock principle of the Public Information Act.

Lastly, I’d like to reiterate a comment I made at your last hearing. It is unacceptable that the documentation for government software programs, including custom versions for a specific government body prepared by that government body, should be considered proprietary information that is therefore inaccessible to the public. As you heard many times today by Public Information Act officers, it is hard for requesters to know exactly what to ask for. If the data structures, input options, and output options of government databases are considered non-public information, this gives insiders a huge information advantage over outsiders and makes a mockery of the right-to-know principles on which the Public Information Act is based. No government agency in Maryland should agree to purchase a software program where such information is considered proprietary and thus only available to government employees. This is especially true of vital democratic software programs such as the election database maintained by the Maryland State Board of Elections (e.g., see [Shame On Maryland’s State Board Of Elections](http://www.eyeonannapolis.net/2013/03/15/shame-on-marylands-state-board-of-elections/)). But it also applies to the workhorse databases of day-to-day government operation. For example, it is very difficult to request salary information without access to the dozens of different types of salary fields maintained in such a database (e.g., for serving as department chair, sports coach, and summer school teacher; and earning overtime, a supplies allowance, and unused personal leave).

Thank you for seeking to improve Maryland’s obsolete and often anti-democratic Public Information Act.

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