



August 19, 2022

VIA ELECTRONIC MAIL

Brian E. Frosh
Maryland Attorney General
200 Saint Paul Place
Baltimore, MD 21202
oag@oag.state.md.us

Re: Office of the Governor's Use of Auto-Deleting Messages

Dear Attorney General Frosh:

We write to raise concerns regarding the potential destruction of public records by the Office of Governor Larry Hogan (OOG), and to recommend that you take appropriate actions to protect Maryland's public records from the use of automatic deletion communication applications such as Wickr.

On December 30, 2021, the *Washington Post* reported that Governor Hogan and members of his staff were conducting official business using Wickr, a messaging application that can be set to either delete messages after a set period or to delete messages immediately after the recipient opens or reads them.¹ According to the *Post*, employees within the OOG have used Wickr to discuss the state's response to the COVID-19 pandemic, including attempts to procure tests from South Korea when test availability was otherwise limited.

Based on this reporting, American Oversight, a 501(c)(3) nonprofit dedicated to government transparency and accountability, submitted a number of Public Information Act (PIA) records requests to the OOG regarding its use of Wickr in conducting state business, as well as a request for its record retention policy, if any, and related documents.² The OOG responded that it had located no responsive records regarding the office's retention policy,³ and despite the *Post's* reporting on the OOG's Wickr usage, the office produced only one Wickr message in

¹ Steve Thompson, *Md. Gov. Larry Hogan's Messages to State Employees Self-Destruct in 24 Hours*, Wash. Post (Dec. 30, 2021, 9:00 AM),

<https://www.washingtonpost.com/dc-md-va/2021/12/30/hogan-wickr-messages-disappear>.

² See "Records Request to Maryland Office of the Governor for Records Retention Schedule," Am. Oversight, Mar. 1, 2022, <https://www.americanoversight.org/document/records-request-to-maryland-office-of-the-governor-for-records-retention-schedule>; "Entity: Maryland Office of the Governor," American Oversight, <https://www.americanoversight.org/entity/maryland-office-of-the-governor>.

³ See "No Records Response from Maryland Office of the Governor for Records Retention Schedule," Am. Oversight, Mar. 15, 2022, <https://www.americanoversight.org/document/no-records-response-from-maryland-office-of-the-governor-for-records-retention-schedule>.

response to American Oversight's requests.⁴ These responses indicate that the OOG may be operating without the record retention schedule required under § 10-610 of the State Government Article of the Annotated Code of Maryland (State Gov't), and that public records reflecting operations and activities of the state's highest-ranked official are likely being destroyed. To ensure that this—and future—administrations understand and abide by Maryland's public records requirements, guidance from your office requiring retention of "correspondence" on messaging applications, including Wickr, Signal, Whatsapp, and others, is needed.

The OOG's use of Wickr runs counter to the statutory text and legislative intent of the PIA, as well as statutory record retention requirements.⁵ The PIA asserts the principle 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." PIA § 4-103(a). The law further requires that public records—broadly defined as any made or received "in connection with the transaction of public business," including "correspondence"—be made available for public inspection, subject to narrowly construed exceptions. *Id.* §§ 4-101(k)(1)(i), (ii)3. The state's records retention statute requires that each unit of government establish record retention and disposal schedules, and mandates that each unit create a procedure for the transfer of permanent records to the Maryland State Archives ("Archives"). State Gov't § 10-610. Furthermore, in accordance with such schedules, "a public official shall offer to the Archives any public record of the official that no longer is needed," instead of merely disposing of such materials. *Id.* § 10-616(a).⁶ The OOG's Wickr use violates both statutory schemes by destroying correspondence of state officers, thus depriving the public of its statutory right of inspection, PIA § 4-103(a), and preventing the "continual" and "efficient management" of state records, including historical preservation, State Gov't § 10-610(a)(1).

The loss of public records through the use of Wickr and similar applications poses a grave threat to government transparency and accountability. Indeed, Maryland state legislators have recognized that the use of ephemeral messaging is incompatible with government transparency and have sought to clarify public record laws to ensure that records created using these

⁴ "Maryland Governor's Office Records Regarding Wickr Communications," Am. Oversight, May 2, 2022, <https://www.americanoversight.org/document/maryland-governors-office-records-regarding-wickr-communications>.

⁵ Indeed, *any* state official's use of such technology poses significant problems for government transparency.

⁶ The OOG has reportedly taken the position that it is not subject to the state's statutory record retention and disposal schedule requirements, claiming that it is not a "*unit* of the state government," but rather the *head* of the state government. *See* Thompson, *supra* note 1 (emphasis added). Governor Hogan's own state archivist has indicated, however, that a retention schedule for the OOG is "something we'd like to have." *Id.* Guidance from your office would be valuable to clarify that the records management and disposition statutes found within MD State Gov't Tit. 10, subtit. 6, should apply to the OOG. It is difficult to conceive of records more important for historical preservation than those produced by the state's chief executive officer, and it is illogical to permit the OOG to exempt itself from the statutory process by which the Archives receives records for permanent retention.

technologies are captured and retained. In 2022, for example, Maryland Delegate Vaughn Stewart III and Senator Clarence Lam sponsored the Transparency in Public Records Act, which would revise the PIA to clarify that the term “record,” includes “any written, electronic, audio, or video communication made in connection with the transaction of public business”—including ephemeral messages. HB 395, CF SB 307, 444th Gen. Assemb., Reg. Sess. (Md. 2022) (“HB 395”).⁷ The bill would also amend the state’s record retention laws, State Gov’t § 10-610, by clearly mandating that the OOG retain a records retention schedule. HB 395 at 5. A number of press and transparency organizations, including Common Cause Maryland⁸ and the League of Women Voters⁹ have expressed support for the proposed bill.

Other jurisdictions have similarly recognized the damage to government transparency caused by officials using self-deleting messaging applications and have taken steps to prevent these practices. In March 2022, the District of Columbia Council passed the Fidelity in Access to Government Communications Clarification Emergency Amendment Act of 2022, which amended the District’s Public Management Act of 1985 to require “the preservation of communications created or received on electronic applications” and to prohibit “the use of electronic applications that do not allow communications to be appropriately preserved.” 69 D.C. Reg. 2633 Act (Mar. 14, 2022) (expired on June 26, 2022). Similarly, the California Supreme Court recently ruled that text messages relating to government business are subject to the state’s record law. *City of San Jose v. Superior Ct.*, 2 Cal. 5th 608, 616, 389 P.3d 848, 852 (2017). Dicta from the Missouri Court of Appeals has opined on the need to update that state’s records law in light of new technological messaging, which the original statute did not contemplate. *Sansone v. Governor of Missouri*, No. WD 84426, 2022 WL 2032254, at *8 & n.7 (Mo. Ct. App. June 7, 2022).

While legislative action is one avenue for clarifying the law, your office need not wait for further action by the Maryland legislature. As the state’s chief law enforcement officer, it is within your authority to issue guidance on compliance with Maryland’s public records law so that record retention practices keep pace with technological developments such as auto-deletion technology and other ephemeral messaging applications.

We share a common mission to promote transparency in government, which necessarily depends on government officials following sound recordkeeping practices with respect to all records used to conduct public business and regardless of the technology used to create and transmit those records. Accordingly, American Oversight respectfully recommends that your Office issue guidance: (1) clarifying that communications regarding public business made

⁷ Available at <https://mgaleg.maryland.gov/2022RS/bills/hb/hb0395f.pdf> and <https://mgaleg.maryland.gov/2022RS/bills/sb/sb0307f.pdf>.

⁸ See “2022 Legislative Review,” Common Cause Maryland, Apr. 1, 2022, <https://www.commoncause.org/maryland/democracy-wire/2022-legislative-review/> (including the Transparency in Public Records Act in a list of proposed legislation supported by the organization).

⁹ See Memorandum from League of Women Voters Maryland President Nancy Soreng in support of the Transparency in Public Records Act, League of Women Voters, Feb. 15, 2022, https://assets.nationbuilder.com/lwvmaryland/pages/166/attachments/original/1644781098/HB_395_-_The_Transparency_in_Public_Records_Act_of_2022.docx.pdf?1644781098.

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through applications such as Wickr, Signal, Whatsapp, and others, are public records and must be retained, and that use of applications whose deletion functions cannot be disabled (or are not disabled by the user) runs afoul of Maryland public records requirements; (2) confirming that the OOG is subject to state record management requirements; and (3) taking whatever enforcement action you deem necessary and appropriate to protect the records of the citizens of Maryland.

Should any of our recommendations require further clarification or explanation, please contact us through email at khahilia.shaw@americanoversight.org or by telephone at (202) 539-6507.

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather Sawyer", with a stylized flourish at the end.

Heather Sawyer
Executive Director
American Oversight

cc:

Maryland Delegate Vaughn Stewart III

Maryland Senator Clarence Lam

Maryland Public Access Ombudsman Lisa Kershner

State Public Information Act Compliance Board Chair John H. West III