Public Information Act:

Basics
and
Best Practices

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Office of the Maryland Attorney General
Maryland Municipal League, Annual Meeting
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PIA stands for...

• Public Information Act
Public Information Act

Annotated Code of Maryland

State Government Article

Sections 10-611 through 10-628
OAG Publications

Legal Analysis and Resources:
*Public Information Act Manual* (2011)

For Custodians of Records:
*Responding to Requests Under the Maryland Public Information Act: A Suggested Process* (2011)

For the Public:
You can find all of these materials at...

www.oag.state.md.us

*click on “Open Government”*
Click right over here...
Maryland Public Information Act

PIA public security exemption report

Access to Government Records Under the Maryland Public Information Act
An brief overview of the Public Information Act intended for the general public.

Maryland Public Information Act Manual (12th Ed.) (October 2011)
A resource for both government officials seeking to meet their responsibilities under the Act and members of the press and public seeking access to information.

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Subjects we will cover today:

Which agencies must comply with the Act?
Who may submit requests under the Act?
What types of records does the Act cover?
Exemptions from disclosure: What types of records may you, or must you withhold?
Process: Timing, fees, appeals, and liability
Which agencies?

- “units or instrumentalities” of State government
- “units or instrumentalities” of local government
- executive, legislative, and judicial branches
Which agencies?

- Applies to quasi-public entities that qualify as “instrumentalities” of State or local government:
  - *City of Baltimore Dev. Corp. v. Carmel Realty Assocs.*
    - Private corporation; public duties
  - *Andy’s Ice Cream, Inc. v. City of Salisbury*
    - Zoo commission; City’s role in appointment, dissolution
Who can ask for a public record under the PIA?

- Newspaper
- State agency
- Political adversary of agency head
- Resident of Virginia
- Prisoner
- Telemarketer
- Edward Snowden
Should you even ask:

Who?

- generally, no
- only if disclosure restricted to the “person in interest”

Why?

- at this stage, no
- possibly relevant later, with respect to fee waiver
What information?

• Not “information” *per se*

• “Public record”:
  • any documentary material // made or received by agency // in connection with the transaction of public business
  • can be in “any form”

• No requirement to *create* documents

• Generally must provide materials in electronic format, if asked
Which of the following is a “public record”?

- Memo to boss about project
- E-mail message to boss about project
- E-mail message to boss on home computer about project
- Text to co-worker about project on Government-issued smartphone
- Weekend text to co-worker about project on personal smartphone
- Personal calendar with daily office schedule, kids’ birthday, and doctor’s appointments
- Records of contractor concerning agency construction project
Summary:

• Records “made . . . or received . . . in connection with the transaction of public business”

• Wherever kept

• “Diligent search reasonably calculated to discover responsive documents”
Guiding Principles for Disclosure

Broad right of access:

“Except as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public records at any reasonable time.”

To be construed

...“in favor of permitting inspection”

unless

...“an unwarranted invasion of privacy”

would result
Exemptions: What may/must be withheld

- Exceptions to the general rule of disclosure
  - disclosure controlled by other law
  - disclosure of specific records prohibited
  - disclosure of specific information prohibited
  - disclosure in discretion of custodian
  - disclosure denied under special court order
Exemptions - Other Law

• Common law privileges
  • attorney-client privilege
  • executive privilege
  • legislative privilege
  • grand jury secrecy

• State statutes

• Federal statutes and regulations

• Court rules and orders
Exceptions to Exemptions

- Disclosure authorized if “otherwise provided by law”
- Applies to all exceptions from disclosure
Mandatory Exemptions - Specific Records

- Adoption records
- Welfare records
- Letters of reference
- Public library circulation records
- Library or museum material donated with confidentiality restriction
- Retirement records
- Traffic citations and charging documents (when requested by attorneys)
Mandatory Exemptions - Specific Records

- Personnel records
- Hospital records
- School records of students
- Certain financial reports filed with Insurance Commissioner
- Records from electronic toll collection
- Records of participants in college savings program
- Recorded images from red light and speed cameras
Mandatory Exemptions - Specific Records

- MVA records containing personal info
- Arrest warrants and criminal charging documents (*prior to service on defendant*)
- MTA records relating to purchase of electronic fare media
- DNR records containing personal information about the owner of a registered vessel
- Application for renewable energy credit certification or claim
- Surveillance images showing illegal dumping or litter
- Certain records relating to the purchase or carrying of handguns
Mandatory Exemptions - Specific Information

- Medical and psychological information
- Sociological information
- Trade secrets, confidential commercial or financial info
- Home address/tel. no. of public employee
- Finances of an individual (except salary of a public employee)
- Computer security information
Mandatory Exemptions - Specific Information

- Licensing records
- Bid analysis information
- Information relating to notary publics
- Social security numbers in marriage licenses or DNR recreational licenses
- Personal information about someone with an alarm system
- Personal information about someone enrolled in a senior citizen activities center
Case Study: Comptroller v. Immanuel
216 Md. App. 259 (Jan. 29, 2014)

Personal financial information

Unclaimed assets held by Comptroller

Request: Names of top 5,000 owners, ranked by value of claim

Ranking = information about personal finances
Exemptions - Discretionary

May withhold certain categories of information

Only if the “custodian believes that inspection . . . would be contrary to the public interest”

Ultimately requires an affidavit
Exemptions - Discretionary

- Privileged inter/intra agency memos
- Examination information
- Research projects by public institutions
- Real estate appraisals before acquisition
- Investigations
- Location of endangered species
- Inventions owned by education institution
Exemptions - Discretionary

- Trade secrets and commercial information of Md. Technology Dev. Corp. or public universities

- Emergency response plans, building plans, etc., if disclosure would endanger public security

- MPA rates and competitive analysis

- Information about UMUC’s competitive position

- Public universities may withhold personal information about students
Last Exemption: Special Court Order

- Records are otherwise disclosable
  - *but* disclosure would cause “substantial injury to the public interest”
- Temporarily deny inspection
  - seek court order within 10 days
  - requester has right to hearing
- Court may deny inspection
- Only “catch-all” available under the PIA
What information must you provide about a public employee?

Yes  No  Maybe

salary
bonus payment
benefits selection
start date
employment contract
home address
work address
references from past employers
complaints about their performance
Guiding Principles for Disclosure

Severability and Redaction

- Even if exemption applies, must “permit inspection of any part of the record that is subject to inspection and is reasonably severable”
Case Study:
*NAACP v. Maryland State Police*
430 Md. 179 (2013)

Personnel exemption – Personnel records “of an individual”

Racial profiling lawsuit – “Driving while black”

Application of redaction requirement to records covered by a mandatory exemption from disclosure

Redact name and record is not longer a “personnel record”
Not an Exemption:

- “Contrary to the public interest”
  - unless a specific exemption applies

- “Unwarranted invasion of privacy”
  - unless a specific exemption applies

- We are a law enforcement agency!
  - not enough by itself...
Summary: Retrieve - Review - Respond

- Review
  - Mandatory exemption: withhold
  - Discretionary exemption: withhold if in public interest
  - If no exemption applies: can withhold only with court order
Timing

What is the time limit for responding to a PIA request?

___ immediately
___ 10 days
___ 30 days
___ promptly, but no later than 30 days
___ none of the above
Copies

- Voluminous requests
- Electronic or other formats
  - 2011 law, now permanent
  - “searchable and analyzable”
- Use of handheld scanners
Fees

How much can you charge for making records available and for making copies?

Can’t charge

Charge as much as you want, as long as you post it prominently

Charge enough to make a reasonable profit

Charge enough to recover costs
Fees

- Search and review time
- Copies
- Cost-based rates
- Fee waivers
  - Must consider “the ability of the applicant to pay the fee”
  - Available if the “custodian determines that the waiver would be in the public interest”
Recurring Fee Issues

- Splitting vs. Aggregating Requests
- Can you charge for attorney review time?
- Perception that fees are used to discourage access
- Are media outlets *always* entitled to a fee waiver?
- Who qualifies as a media outlet in today’s internet world?
**Appeal Rights**

- Petition for judicial review in the circuit court
- For agencies subject to the State APA, availability of administrative appeal
- Do not need to go through any administrative appeals first; can go straight to court
- Appeal to be “expedited in every way”
Remedies for Violations: A Summary

• Injunctive relief against agency

• Actual damages for willful violations
  • Agency
  • Employee (records with personal info)

• Attorney fees and costs

• Disciplinary action against employee

• Criminal fine for willful violations
Keys to Compliance

- Clear process
- Effective training
- Professional attitude
Separate Simple from Complex

- Records clearly disclosable
  - Make available immediately – website?
  - Copies
  - Reasonable, pre-set fees

- Complex or unusual requests
  - Written request
  - Route to coordinator
Promptly Identify Problems

- Records don’t exist
- Records belong to another agency
- Unclear request
- Overbroad request
- Possible delays
  - voluminous records
  - archived records
  - redaction of exempt material
Retrieve - Review - Respond

• Retrieve records promptly

• Consult, as necessary
  • “person in interest”
  • provider of records

• Review
  • determine whether exemptions apply
Retrieve - Review - Respond

- If part of record is exempt: redact
- Timetable: 30 days or sooner, unless requester grants extension
- Spell out exemptions, legal authority
- Notify the requester of their appeal rights
Embrace the PIA

• Be open and helpful
  ...and please...

• TALK to the REQUESTER