PIA
Basic Principles, Legislative Changes, and Recurring Issues

Subjects to be Covered:

- Overview of the PIA, amended effective October 1, 2015
- Wholly new provisions created by 2015 amendments
  - PIA Compliance Board
  - Ombudsman
- Recurring PIA problems, hypotheticals
Public Information Act

General Provisions
Article
Sections 4-101 through 4-601

OAG Publications

• Legal Analysis and Resources:
  Public Information Act Manual (2014)

• For Custodians of Records:
  Responding to Requests Under the Maryland
  Public Information Act: A Suggested Process

• For the Public:
  Access to Government Records Under the
  Maryland Public Information Act

You can find all of these materials at…
PIA Overview . . .

- Which agencies must comply?
- Who may submit requests?
- 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?

- State and Local Governments
- All 3 Branches:
  - Executive Branch
  - Legislature
  - Judiciary
- Quasi-public entities that qualify as "instrumentalities" of government
Who can ask for a public record under the PIA?

<table>
<thead>
<tr>
<th>Option</th>
<th>Yes</th>
<th>No</th>
<th>Maybe</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newspaper</td>
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<tr>
<td>Prisoner</td>
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<tr>
<td>Political adversary of Mayor</td>
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<tr>
<td>Data Miner</td>
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<tr>
<td>Anti-Government activist</td>
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<tr>
<td>Edward Snowden</td>
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<tr>
<td>Resident of Virginia</td>
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</table>

Who is the Custodian?

Two Kinds:

- "Official custodian" has legal responsibility for keeping records; often top official within agency
- "Custodian" also includes anyone who is authorized to have "physical custody and control" of the record

Finding the Right Custodian

If a request comes to you, but you are not the custodian:

- Notify the requester of that fact within 10 working days;
- Refer the requester to the correct custodian (if known); and
- Give the location or possible location of the record (if known).
What Records?

“Public record”:  
- any documentary material . . .
- made or received by the agency . . .
- in connection with the transaction of public business . . .
- in any form

Which of the following is a “public record”? 

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>Maybe</th>
<th>No</th>
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</thead>
<tbody>
<tr>
<td>Email to boss about project</td>
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<td></td>
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<tr>
<td>Drafts of report on your home computer</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Text to friend about how much you hate project</td>
<td></td>
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<tr>
<td>Emails between County Commissioners on private accounts</td>
<td></td>
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<tr>
<td>Personal calendar with daily office schedule, kids’ birthday, and doctor’s appointments</td>
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</tbody>
</table>

Hypothetical No.1
The Fire Chief & the Audit Report
Hypothetical No.1
The Fire Chief & the Audit Report

• Is the audit report a public record?
• Did the Fire Chief respond correctly to Mr. Williams’ request?
• Could the Chief have denied the request because it was made as part of a private dispute and for malicious reasons?

Requests for Information

PIA provides for access to records, not “information”
Ordinarily, not required to create a record
Complicated for electronic records

Electronic Databases

No obligation “to create, compile, or program a new public record”

But . . .

The act of “providing a portion of the public record . . . does not constitute creating a new public record.”

GP § 4-205(c)(4)(iii)

GP § 4-205(c)(5)
Electronic Databases

*Comptroller v. Immanuel*

216 Md. App. 259 (2014)

Extracting a list of the top 5,000 account holders from much larger database is *not* the creation of a new record

Controlling principle:

“…within [the agency's] existing functionality and in the normal course…”

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Sufficiency of Search

“Diligent search reasonably calculated to discover responsive documents”

– Wherever kept

– Keep track of which sources searched, which key words used

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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 allowing inspection"

“unless an unwarranted invasion of the privacy of a person in interest would result”

Redact exempt material, provide the rest
Guiding Principles for Disclosure

Purpose of request does not matter

Exemptions:
What may/must be withheld

Five categories of exceptions to the general rule of disclosure

Identify them by the part of General Provisions Title 4, Subtitle 3 in which they appear

Exemptions:
What may/must be withheld

Exceptions to the general rule of disclosure

Part I: Other Law
Part II: Mandatory, Specific Records
Part III: Mandatory, Specific information
Part IV: Discretion of Custodian
Part V: Withhold under Special Court Order
Agency's Burden

- Exemptions must be narrowly construed
- Burden on the agency to show that exemption applies

Part I 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

Part II: Mandatory, 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, 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
- MVA records containing personal info

Mandatory, Records

- 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
- Captured license plate data

NAACP v. Maryland State Police
430 Md. 179 (2013)

Personnel exemption – Personnel records “of an individual”

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

Redact name and record is no longer a “personnel record of an individual”
Maryland State Police v. Dashiell
443 Md. 435 (2015)

Addresses issue raised by NAACP Branches: A request for the internal affairs records of a single officer
Court agrees that redaction not possible; remains a “personnel record”
Left unanswered: How many records are enough to mask the employee’s identity?

Part III: Mandatory, 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

Part III: Mandatory, 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
**Comptroller v. Immanuel**


Unclaimed assets held by Comptroller

Includes information about relative value of personal finances

On appeal to Court of Appeals . . .

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**Part IV 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

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**Part IV Discretionary Exemptions**

- 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
Discretionary Exemptions

- 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

*Glenn v. DHMH*, 446 Md. 378 (2016)

- First and only published appellate decision rendered under what is now § 4-358
- Private abortion clinics; watchdogs vs. potential for violence
Not an Exemption:

- “Contrary to the public interest”
  - unless a specific exemption applies
- “Unwarranted invasion of privacy”
  - unless a specific exemption applies

What information must you provide about a public employee?

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<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Maybe</th>
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<tbody>
<tr>
<td>Salary</td>
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<tr>
<td>Bonus payment</td>
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<tr>
<td>Benefits selection</td>
<td></td>
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<td></td>
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<tr>
<td>Sick leave balance</td>
<td></td>
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<td></td>
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<tr>
<td>Start date</td>
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<td></td>
</tr>
<tr>
<td>Employment contract</td>
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<td></td>
</tr>
<tr>
<td>Home address</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>References</td>
<td></td>
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<tr>
<td>Complaint about performance</td>
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</tbody>
</table>

Timing

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

___ promptly
___ no later than 80 days
___ 60 days, with consent of requester
___ all of the above
___ none of the above
**New Timing Provisions**

10-day Letter

If it will take more than 10 working days to respond, notify in writing and explain:

1. how much time is necessary,
2. the reason for the delay, and
3. “an estimate of the range of fees that may be charged”

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**New Timing Provisions**

10-day Letter

- Failure to provide a 10-day letter precludes a finding that a violation of 30-day deadline was the result of a “bona fide” dispute
- Old law: ACLU of Maryland v. Leopold, 223 Md. App. 97 (2015) – Agency ok if it partially responds within 30 days and begins “reasonable” dialogue about refining broad request

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**Hypothetical No.2**

Citizens for Less, Efficient Government
Hypothetical No.2
Citizens for Less, Efficient Government

Was Ms. Zadora’s response timely?
Does the personnel records exemption apply?
What else could Ms. Zadora have done here?
Does the size of the agency matter?

Denial Letter

What to include?

- Reasons for the denial
- Legal authority for the denial
- Notice of remedies

Denial Letter

Reasons for the denial:

- Must now provide “a brief description of the undisclosed record that will enable the applicant to assess the applicability of the legal authority for the denial”
- For discretionary exemptions, must now provide “a brief explanation of why the denial is necessary”
Denial Letter

Notice of Remedies

Judicial Review

PIA Compliance Board (if fee > $350)

Ombudsman

Copies

• Hard copies
• Use of handheld scanners
• Judicial review available for denial of copies

Fees

*What can agency charge for?*

“the search for, preparation of, and reproduction of a public record”

Three legislative developments . . .
Fees

Standard format vs. customized format

For each, agency may charge a "reasonable fee," but

- Records prepared in a "standard format": may charge "the actual costs of the search for, preparation of, and reproduction of the records"
- Records prepared in a "customized format": may charge a "reasonable fee"

"Reasonable fee" = A fee "bearing a reasonable relationship to the recovery of actual costs incurred"

Fees

How should agency charge?

- Based on each employee’s “salary and actual time attributable to the search for and preparation of a public record”

Fees

Charge for attorney review time?

- “... staff and attorney review...”
- First acknowledgement that it is appropriate for agencies to charge for attorney review time
Fee Waivers

Now two independent standards:

- Public Interest
- Indigence

Fee Waivers

Public Interest Standard:

- The custodian determines that a waiver “would be in the public interest”
- Must consider “the ability of the applicant to pay the fee”
- Media requests vs. inmates

Fee Waivers

Indigence Waivers

- Requester is an “individual”
- Requester is indigent
- Requester submits an affidavit of indigence

Definition of “indigent” – family household income is less than 50% of the median family income for the State ($52,000, family of four)
Fee Waivers

Waiver decision remains discretionary

“The custodian *may* waive a fee under this section if . . . .”

Recurring Fee Issues

Splitting vs. Aggregating Requests

Prepayment of fees

Are media outlets *always* entitled to a fee waiver?

Who qualifies as a media outlet in today’s internet world?

Recurring Fee Issues

New definition of “news media”:

- Newspapers, magazines, and print media
- Press associations, news agencies, wire services
- Radio, television
- “any printed, photographic, mechanical, or electronic means of disseminating news and information to the public.”
Fees: The Good, the Bad, and the Ugly

- The Good: Allowed by statute; internalize non-public expenses
- The Bad: Perception that fees are used to discourage access
Fees:
The Good, the Bad, and the Ugly

- The Good: Allowed by statute; internalize non-public expenses
- The Bad: Perception that fees are used to discourage access
- The Ugly: Constituent complaints prompt legislative initiatives

Broad Requests & High Fees

- **Talk** to the requester
- **Explain** why the request is broad and the fee high
- **Help** the requester be more specific
- **Suggest** alternative approaches

Hypothetical No.3
Sharon Infoe & State College Finances
Hypothetical No.3
Sharon Infoe & State College Finances

Did Mr. Files respond to Ms. Infoe’s request in a timely fashion?

Should the College have granted Ms. Infoe’s request for a fee waiver?

What else could Mr. Files have done?

Appeal Rights

- Compliance Board
- Ombudsman
- Judicial Review

PIA Compliance Board

Limited Jurisdiction
- Fees Only
  - Amount must > $350
- Requester must allege fee is “unreasonable”
PIA Compliance Board

Modeled on the Open Meetings Compliance Board

- Not contested cases; decided on the papers, with possibility of “informal conference”
- But…binding orders – agency must refund excess fees

PIA Compliance Board

Process:

When may requester file complaint?
- Within 90 days of date agency “charged” fee
- Not 10-day letter, unless prepayment?

Does requester have to pay first?
- Probably not . . .

PIA Compliance Board

Right to Judicial Review

- For both custodian and requester
- Requester does not need to exhaust remedy
- Compliance with order of Board does not constitute an admission for purposes of any parallel court proceeding
- Automatic stay of Board decision until 30 days after answer is filed
Ombudsman

Public Access Ombudsman
- New office within the AG’s Office
- Mediates PIA disputes
- Opposite of PIA Compliance Board – broad jurisdiction
  no binding decisions

Ombudsman

Broad Jurisdiction:
- Can consider any dispute “relating to requests for public records” under the Act
- Requesters and custodians can initiate dispute
  Statute identifies some specific types of disputes that Ombudsman can hear
  Includes the amount of time a custodian “needs, given available staff and resources, to produce public records” – extensions?
Ombudsman

Limited Power

- Mediates only – resolve disputes through discussion
- Does not issue a binding decision – no judicial review, no exhaustion – very informal
- Cannot compel disclosure of records, even to Ombudsman herself! – if agency gives, Ombudsman must keep confidential

Ombudsman

Contact Information:

Lisa Kershner
lkershner@oag.state.md.us
(410) 576-7037

Judicial Remedies

Against Agency . . .

- Injunctive relief
- Agency liability expanded:
  - New statutory damages – up to $1,000
  - Deleted “clear and convincing evidence” standard
- Attorney fees and costs
Judicial Remedies
Against Custodian . . .
- Custodian liability hasn’t changed – actual damages only
- Disciplinary action
- Criminal fine for willful violations